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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

BRENT N. HUGHES,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,
STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari
To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the comprehensive investigatory, administrative and judicial review process enacted by Congress in the Hatch Act, 5 U.S.C. § 1501, et seq., preempt state law and thereby preclude a state agency from terminating the employment of a state merit system employee sans any investigation by the Office of Special Counsel or any adjudication by the Merit Systems Protection Board that the employee had violated the Hatch Act?

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PETITION FOR WRIT FOR CERTIORARI

Brent M. Hughes respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS AND ORDERS

The opinion of the Utah Supreme Court (App. 1-22) is reported at 2007 UT 30, 156 P.3d 820. The Utah Career Service Review Board's Decision and Final Agency Action dated June 17, 2005 (App. 23-53) is unreported. The Administrative Law Judge's Findings of Fact, Conclusions of Law, Decision and Order dated November 4, 2004 (App. 54-67) is unreported. Robin Arnold-Williams, Executive Director of DHS, letter decision terminating Petitioner's employment dated June 18, 2004 (App. 68) is unreported.

JURISDICTION

The decision of the Utah Supreme Court was entered on March 27, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the appendix to this petition. App. 70-93.

STATEMENT OF THE CASE

The Utah Supreme Court invaded the exclusive province of the Office of Special Counsel, the Merit Systems Protection Board and the Federal Courts by enforcing and interpreting the Hatch Act in that it sanctioned the termination of the employment of a state merit employee, with vested employment rights, based on a State Agency's mere perception that Petitioner violated the Hatch Act.

In 5 U.S.C. § 1501-1508, the United States Congress enacted legislation regulating the political activity of certain state and local merit employees, commonly known as the Hatch Act. The Hatch Act grants exclusive jurisdiction to the Office of Special Counsel (herein "OSC") to investigate alleged violations of the Hatch Act and file charges with the Merit Systems Protection Board (herein "MSPB"). The MSPB is statutorily clothed with authority to determine whether a violation of the Hatch Act has occurred and, if so, whether termination of employment is warranted. 5 U.S.C. § 1505. If the MSPB orders termination of employment, the state agency has thirty (30) days to comply with the MSPB's decision or suffer loss of a portion of its federal funding. 5 U.S.C. § 1506. The decision of the MSPB is exclusively appealable through the federal court system. 5 U.S.C. § 1508.

Petitioner was a merit employee of the Utah Department of Human Services (herein "DHS") for twenty-five (25) years when his employment was terminated based on his alleged violation of the Hatch Act. App. 57, 63. The DHS had not previously disciplined any of its merit employees for becoming a candidate or holding partisan political office, but at least four (4) merit employees had

sought or held partisan political office – none, however, suffered any discipline or loss of employment. App. 45-46. To the date of this Petition, the OSC has neither initiated an investigation nor issued an advisory opinion concerning whether Petitioner allegedly violated the Hatch Act. The MSPB has likewise not issued any decision concerning whether Petitioner allegedly violated the Hatch Act or whether termination of his employment with DHS was warranted. App. 47.

1. ***Termination of Petitioner's Employment.*** Brent Hughes, Petitioner, filed his candidacy for the Utah House of Representatives on March 17, 2004. App. 57. Initially, Dr. Robin Arnold-Williams, Executive Director of the DHS (Petitioner's employer), informed Petitioner's supervisor that he could continue to concurrently seek office and remain employed; however, if elected, he would then need to resign. R. 1444. Two months later, the DHS changed its position and instructed Petitioner to either (i) abandon his candidacy, (ii) resign from his merit position, or (iii) take an unpaid leave of absence through the election. App. 58; R. 1455-1456, 1458. Dr. Arnold-Williams terminated Petitioner's employment with the DHS on June 18, 2004, when he respectfully declined to elect one of the three options. App. 59. Petitioner ultimately lost the election on November 2, 2004.

2. ***Evidentiary Hearing before the State Administrative Law Judge.*** Petitioner timely appealed Executive Director Arnold-Williams' decision terminating his employment to the Utah Career Service Review Board (herein "CSRB"). The CSRB appointed Mark E. Kleinfield (herein "ALJ Kleinfield") as administrative law judge to hold an evidentiary hearing and issue a decision on Petitioner's appeal. Prior to the evidentiary hearing,

Petitioner filed a Motion for Summary Judgment asserting, inter alia, that three (3) other merit employees of DHS had sought and/or held partisan elective office but had not been required to take unpaid administrative leave or suffer termination of their employment. R. 73-88. On September 21, 2004, ALJ Kleinfield issued his decision denying Petitioner's motion for summary judgment. R. 1076-1083.

A two-day evidentiary hearing was had before ALJ Kleinfield on September 28-29, 2004. App. 54. At the close of Respondent's case in chief, Petitioner's counsel moved for a directed verdict on several grounds including preemption, due process and inconsistent discipline. R. 1432; p. 118-146. ALJ Kleinfield denied Petitioner's motion. R. 1432; p. 146-152. After the hearing concluded, ALJ Kleinfield requested that both parties file post-hearing briefs on the issue of preemption. R. 1201-1229, 1235-1251. On November 2, 2004, ALJ Kleinfield issued his Findings of Fact, Conclusions of Law, Decision and Order. App. 54. In his Decision, ALJ Kleinfield concluded that the DHS had failed to carry its burden of proof by substantial evidence that the Petitioner failed to comply with agency rules/policies or acted with misfeasance, malfeasance, or failed to advance the good of the public in violation of Utah Administrative Code R. 477-11-1(1)(a) & (c). ALJ Kleinfield reasoned that, although a violation of the Hatch Act (as might be determined by the MSPB) would potentially be encompassed within the grounds for discipline under Utah Administrative Code R. 477-11-1(1), Petitioner's possible violation of the Hatch Act did not rise to the level of adequate cause under R. 477-11-2 to justify termination of Petitioner's employment with the DHS. App. 61-62.

ALJ Kleinfield also noted that the inconsistent treatment of other DHS merit employees – former Senator Robert Muhlestein, former Representative Ty McCartney, John Thompson and Mayor Glenn Barrow, was acceptable because the DHS did not understand the Hatch Act nor comprehend how to interpret or implement the Hatch Act. App. 64.

3. ***Decision and Final Agency Action of the Career Service Review Board.*** The DHS appealed the decision of ALJ Kleinfield to the CSRB. After briefing and oral argument, the CSRB issued its Decision and Final Agency Action on June 17, 2005, (the "CSRB's Decision") affirming ALJ Kleinfield's Decision ordering Petitioner reinstated. App. 23. The CSRB held that DHS' internal conflict of interest policy was premised on a Hatch Act violation and there must be a determination of a Hatch Act violation by the MSPB as a condition precedent to a policy violation occurring; alternatively, if the DHS internal policy was not predicated on a Hatch Act violation, then it improperly restricted an employee's right to run for public office under Utah Code Ann. § 67-19-19 (2004).

The CSRB's Decision was underpinned by three (3) primary arguments: 1) the Hatch Act preempted State enforcement based on the pervasive federal regulatory scheme, which leaves no room for the States to supplant the Hatch Act; 2) the Hatch Act: (a) imposed a duty upon federal agencies to report suspected violations to the OSC; (b) granted the OSC exclusive jurisdiction to investigate and report violations to the MSPB; and (c) required the OSC to file charges against a merit employee with the MSPB if the OSC concluded that a violation of the Hatch Act has occurred and; 3) any appeal from a MSPB decision

is also reviewable only by the federal courts. App. 43-48; *See*, 5 U.S.C. § 1508.

The CSRB also determined that it would be irresponsible to allow the many state agencies to make independent and potentially inconsistent determinations regarding alleged violations of the Hatch Act when past practice demonstrated inability to correctly apply the Hatch Act. App. 45-46.

4. ***Certification to the Utah Supreme Court.*** The DHS appealed the CSRB's Decision to the Utah Court of Appeals. On March 23, 2007, the Utah Court of Appeals entered its order certifying and transferring the DHS' appeal to the Utah Supreme Court.

5. ***Utah Supreme Court Decision.*** After briefing and oral argument, the Utah Supreme Court issued its decision on March 27, 2007. App. 1. The Utah Supreme Court interpreted the Hatch Act as not preempting state law but rather as simply providing an incentive to States to voluntarily comply with the Hatch Act. The Utah Supreme Court held that state agencies may make independent determinations regarding perceived violations of the Hatch Act with respect to their employees, and can justify termination of employment thereon. App. 2. Further, that the CSRB has the authority to review any termination of merit employees' vested rights by any Utah State Agency based on the Hatch Act. App. 7. The Utah Supreme Court reasoned that the Hatch Act's purpose is to merely provide an incentive (federal funding) for States to comply with the Hatch Act; and in order to protect that funding, State agencies have the authority to make an independent determination of a perceived Hatch Act violation that may not be inconsistent with the Hatch Act. App. 2. The Utah

Supreme Court also noted the CSRB's concern that Petitioner was treated differently than other DHS employees who had violated the Hatch Act and remanded the issue of Petitioner's due process claim to the CSRB for further consideration. App. 20-22.

REASONS FOR GRANTING THE PETITION

The Utah Supreme Court Erroneously Decided That The Hatch Act Does Not Preempt State Law

1. ***Congress Has The Power To Preempt State Law.*** Congress' power to preempt State and local law derives from the Supremacy Clause contained in Article VI, Section 2, of the United States Constitution, which provides, in pertinent part, as follows:

> " . . . [2] *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding." (Emphasis supplied).

The Supremacy Clause has imbued Congress with the power to preempt state law in two general ways: express and implied. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Express preemption, often referred to as "complete preemption," occurs when a federal statute states an explicit intent to preempt state law. *Id.* Implied preemption occurs when "a federal statute implicitly overrides state law either when the scope of a statute indicates that

Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal citations omitted). These scenarios of implied preemption have become known, respectively, as "field preemption" and "conflict preemption."

In *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996), Justice Breyer set forth the standards to analyze a pre-emption issue, to-wit:

> "Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 530-531 (1977). More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or non-specific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. *Id.*, at 525; *Fidelity Fed. Save. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153 (1982). A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Alternatively, federal law may be in "irreconcilable conflict" with state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes

> and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *Barnett Bank* at 31.

The Utah Supreme Court erred when it held that a mere perceived violation by Petitioner of the Hatch Act could be enforced pursuant to Utah statute (Utah Code Ann. § 67-19-19), State of Utah Administrative Code (R. 477-9-4) and DHS' internal personnel policies. The Utah Supreme Court also erred when it held that the Hatch Act does not preempt state law or preclude state court jurisdiction (inclusive of the CSRB) under the implied field preemption and implied conflict preemption doctrines.

2. *Implied Field Preemption.* This Court has identified two (2) methods to establish implied field preemption:

> "[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English v. General Elec. Co.*, 496 U.S. 72, 79, 100 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (citations omitted).

An implied field preemption analysis permits Congressional intent to be inferred in two (2) ways: 1) the scheme of federal regulation must be so pervasive as to show Congress left no room for supplementation by states,

or 2) the federal act concerns a field in which the federal interest dominates irrespective of the pervasiveness of regulatory schemes." As noted in Justice Breyer's opinion in *Barnett Bank*, supra, the Courts have examined a federal statute's "structure and purpose" to determine if a "pervasive" scheme is self-evident such that a "clear but implicit, preemptive [Congressional] intent . . . " to preempt State law can be determined. *Barnett Bank* at 31.

a. The Hatch Act Grants The MSPB The Sole Authority To Enter Orders Enforcing The Hatch Act.

When squarely presented with disputes regarding State authority, vis-à-vis the Hatch Act,[1] the Federal

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[1] In 5 U.S.C. § 1505, Congress unambiguously authorized the MSPB to adjudicate Hatch Act disputes:

> **"§ 1505. Hearings; adjudications; notice of determinations**
>
> Either the State or local officer or employee or the State or local agency employing him, or both, are entitled to appear with counsel at the hearing under section 1504 of this title, and be heard. After this hearing, the *Merit Systems Protection Board shall* –
>
> *(1) determine whether a violation of section 1502 of this title has occurred;*
>
> *(2) determine whether the violation warrants the removal of the officer or employee from his office or employment*; and
>
> (3) notify the officer or employee and the agency of the determination by registered or certified mail." (emphasis supplied).

Because the 10th Amendment of the United States Constitution precludes the federal government from directly terminating a state employee's employment, Congress achieved its purpose with the federal purse strings under 5 U.S.C. § 1506, to-wit:

(Continued on following page)

Courts have consistently held for over forty-five (45) years that the States lack enforcement authority involving

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"§ 1506. Orders; withholding loans or grants; limitations

(a) When the Merit Systems Protection Board finds –

(1) *that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Board that he has violated section 1502 of this title and that the violation warrants removal*; or

(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency; *the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation*. When the State or local agency to which appointment within 18 months after removal has been made is one that receives loans or grants from a Federal agency, the Board order shall direct that the withholding be made from that State or local agency." (emphasis supplied).

Federal funding is only withheld after a determination by the MSPB that a Hatch Act violation has occurred, the violation warrants removal and the employee is not removed within thirty (30) days after notice to the state agency of the MSPB's decision. The funding issue is integrally linked to the determination that the violation warrants removal. To try to "unlink" the funding issue and the removal of the employee is to ignore the purpose of the Hatch Act, that the MSPB is the administrative tribunal charged with determining when there is a Hatch Act violation, and if so, whether the violation warrants removal of the employee from his employment so as to avoid any potential loss of federal funding.

enforcement and application of the Hatch Act.[2] The first such example arose during the commencement of the civil rights protests in Alabama in 1960. Specifically, in *State of Alabama v. Jones*, 189 F. Supp. 61, 63-64 (D.M.D. Ala. 1960), District Judge Johnson was faced with a situation wherein the State Highway Director for the State of Alabama Highway Department, one Sam Engelhardt, Jr., was alleged to have violated the Hatch Act by holding the office of State Democratic Executive Committee for Alabama. Mr. Engelhardt believed the federal government did not have the authority to pursue charges against him through the MSPB's predecessor, the United States Civil Service Commission, and so he sought injunctive relief in the state circuit court of Montgomery County, Alabama. The United States government immediately sought removal of the proceedings as provided in 28 U.S.C. § 1442 and District Judge Johnson then dismissed Mr. Engelhardt's claims on the basis that the state court did not have authority to enter injunctive relief against the Civil Service Commission, to-wit:

> "It is quite apparent from the appropriate authorities – recently cited by this Court several times – that *a State court does not have the authority to review the exercise of discretion by federal officers in the performance of their official duties*." *Id.* (Emphasis supplied).

In 1969, a special three (3) judge panel of the District Court for the United States District Court of Columbia granted the government's motion to dismiss the complaint

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[2] Petitioner's counsel have been unable to locate any Code of Federal Regulation (CFR) suggesting that the State of Utah has any enforcement authority under the Hatch Act.

filed by a county employee seeking to challenge the Hatch Act on Constitutional grounds. In *Dingess v. Hampton*, 305 F. Supp. 169 (D.C.D.C. 1969), the panel, via an opinion issued by Circuit Judge McGowan, dismissed the employee's claims because the OSC's predecessor had filed an affidavit indicating that the OSC did not desire to pursue enforcement of the Hatch Act against the employee. In so holding, Judge McGowan explicitly determined that the MSPB's predecessor (i.e. the Civil Service Commission) had "sole authority" to enforce the Hatch Act:

> "We do not deal with each of these contentions because we think that at least one of them is decisive. That one turns upon the fact that *Congress has committed to the Civil Service Commission the sole authority to enforce the Hatch Act, and has hedged that authority about with a full panoply of procedural protections at the Commission level, culminating in an explicit right to judicial review of any adverse determination which the Commission may make.*" *Id.* at 173. (Emphasis supplied).

Only two (2) years later, in *Brooks v. Nacrelli*, 331 F. Supp. 1350 (D.E.D. Pa. 1971), Judge Harold K. Wood, Federal District Court Judge for the Federal Eastern District of Pennsylvania, was presented with a lawsuit by residents of Chester, Pennsylvania, seeking to enjoin the Chester Police Department from allegedly violating the Hatch Act. In dismissing the residents' complaint, Judge Wood cited the three (3) judge panel decision in *Dingess* for the proposition that the residents did not have authority to pursue enforcement of the Hatch Act, to-wit:

> "Plaintiffs argue that they have standing to bring an action for alleged violations of the Hatch Act. The Act provides (5 U.S.C. § 1504, 1505) that

> violations are to be reported to the Civil Service Commission. The Commission determines whether the Act has been violated and this determination is subject to judicial review. (5 U.S.C. § 1508) *It is clear that the Civil Service Commission has the sole authority to enforce the provision of the Hatch Act. Dingess v. Hampton, 305 F. Supp. 169 (D.C.D.C. 1969).* Thus, regardless of whether plaintiffs have standing as aggrieved parties, *it is obvious that to permit them to bring an action based on alleged Hatch Act violations would be to permit a bypass of the administrative procedure set forth by Congress.* Accordingly, we do not believe that plaintiffs can properly base their cause of action on alleged violations of the Hatch Act." *Id.* at 1354. (Emphasis supplied).

In 1982, in *French v. Devine*, 547 F. Supp. 443 (D.D.C. 1982), District Judge Bryant dismissed a Constitutional challenge to the Hatch Act because there existed no justifiable controversy since neither the OSC, nor the MSPB, were involved in any proceedings against the plaintiff. In so holding, Judge Bryant noted that the *Dingess* decision correctly stated the law to be that the MSPB had exclusive enforcement authority regarding the Hatch Act, to-wit:

> "Moreover, '*Congress has entrusted enforcement of the (Hatch) Act exclusively to the (MSPB) . . . because of its long history of functioning in this area and the corresponding expertise it had acquired in divining and applying the reach of the Congressional purposes vis-à-vis the prohibited political activity.' Dingess, 305 F. Supp. at 174.* The legislative history of the Hatch Act's application to various categories of District of Columbia employees is long and complex. An advisory opinion from the Special Counsel would enhance the

> court's record by elucidating policies underlying the Hatch Act's coverage of certain D.C. employees." *Id.* at 447. (Emphasis supplied).

And finally, in 2002, in *Abiff v. Virgin Islands Legislature*, 216 F. Supp. 2d 455 (D.V.I. 2002), District Judge Moore of the District Court of the Virgin Islands, was faced with a constitutional challenge to the Virgin Islands' Legislature's enactment of a "little hatch act." In ruling that the Virgin Island's "little hatch act" was constitutional so long as it applied exclusively to state funding, and not federal funding issues, District Judge Moore explicitly held that he was obligated to do so because the MSPB had sole enforcement authority regarding the Hatch Act, to-wit:

> "*Congress has vested the enforcement of the Act in the Merit Systems Protection Board ['MSPB']. Id. § 1504.* This Court has no jurisdiction to enforce the Hatch Act.[FN7].
>
> > FN7. *Congress has vested the authority to enforce the Hatch Act solely in the MSPB, and district courts have jurisdiction to consider only the decision of the Board. See* 5 U.S.C. § 1508; *see also Hall v. Clinton*, 285 F.3d 74, 83 (D.C. Cir. 2002) (noting that the Hatch Act does not provide a private cause of action); *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1354 (D.E.D. Pa. 1971) (finding that court lacked jurisdiction to consider plaintiffs' request for injunctive relief under the Hatch Act, "regardless of whether [they] have standing as aggrieved parties, [because] it is obvious that to permit them to bring an action based on alleged Hatch Act violations

> would be to permit a bypass of the administrative procedure set forth by Congress"); *Dingess v. Hampton*, 305 F. Supp. 169, 175 (D.C.D.C. 1969) (declining to exercise jurisdiction over First Amendment claim under the Hatch Act where the Civil Service Commission (then charged with enforcing the Act) . . . " *Id.* at 460. (Emphasis supplied).

To date, the lower Federal courts have consistently held that they do not have any authority/jurisdiction to adjudicate/enforce the Hatch Act unless and until such time as the MSPB has rendered a decision in any specific case. Inasmuch as the Federal courts are constitutionally authorized under Article III of the United States Constitution, Petitioner respectfully submits that Congress could not have possibly intended to give the Utah Supreme Court or the DHS greater enforcement authority than the Federal Judiciary. Petitioner therefore respectfully submits that DHS lacked any legal authority to enforce the Federal Hatch Act unless, and until, DHS might be ordered by terminate Petitioner's employment as provided in the Hatch Act at 5 U.S.C. § 1505.

b. The Hatch Act's Regulatory Scheme Is So Pervasive And Complex That Congress Left No Room For Supplementation By The States.

In addition to *Jones, Dingess, Brooks, French* and *Abiff*, Petitioner respectfully submits that a brief review of the Hatch Act clearly demonstrates a scheme of federal regulation so pervasive that Congress left no room for supplementation by the States with respect to activity prohibited by the Hatch Act. The CSRB correctly determined that the

Hatch Act, and the federal regulations promulgated pursuant to its mandate, create a comprehensive and pervasive investigative,[3] administrative[4] and judicial

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[3] In 5 U.S.C. § 1504, Congress gave the OSC authority to investigate alleged violations of the Hatch Act:

> **"§ 1504. Investigations; notice of hearing.**
>
> When a Federal agency charged with the duty of making a loan or grant of funds of the Untied States for use in an activity by a State or local officer or employee has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board, which shall –
>
> (1) fix a time and place for a hearing; and
>
> (2) send, by registered or certified mail, to the officer or employee charged with the violation and to the State or local agency employing him a notice setting forth a summary of the alleged violation and giving the time and place of the hearing."

[4] In *Dingess*, the Federal Court dismissed a plaintiff's complaint seeking injunctive and declaratory relief determining the Hatch Act unconstitutional where there had been no MSPB decision because the Plaintiff had failed to exhaust his administrative remedies before the MSPB, to-wit:

> "The precise disposition we make here is, however, geared more specifically to the concept of the availability of a judicially reviewable administrative determination of amenability to the Hatch Act as a bar to the exercise of jurisdiction in a case like the one before us. There are undoubtedly overlaps in the jurisdictional principles of case or controversy, the threat of irreparable injury, and ripeness or exhaustion of administrative remedies. The first two may, of course, suffice to restrict access to the courts even in those cases where the legislature has failed to utilize the administrative process for enforcement. *Where, as here, the administrative machinery, including broad judicial review, has in fact been*

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review process that is designed for the OSC and MSPB to retain absolute and unconditional control regarding the enforcement of the Hatch Act.

Since the DHS is a state agency, it has no statutory duty or obligation under the Hatch Act to report Petitioner's circumstance to the OSC. *See*, 5 U.S.C. § 1504; R. 001494. Moreover, the Hatch Act explicitly and solely imposes upon Federal agencies a duty to report alleged Hatch Act violations to the OSC. *See*, 5 U.S.C. § 1504. Further, Congress required the OSC to investigate any such report and present "information and findings" to the MSPB. *Id.* If the OSC determines appropriate charges are to be filed, the OSC is also statutorily required to file the same with the MSPB. *Id.*

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provided, it seems to us appropriate to look first to the impact of such provision upon judicial jurisdiction.[FN8] On the record before us, that look compels the conclusion that the motion to dismiss is well taken in this respect and should be granted.

FN8. *At stake in this area is not only the efficient utilization of judicial time and energies, but also the integrity of the administrative process as a valuable adjunct in the implementation of legislative policies. Congress has widely employed the independent administrative agency, subject to judicial review, in the enforcement of its statutes. If judicial by-passes are to be freely and easily provided, and without reference to the most extreme and urgent circumstances, the utility and value of the administrative process will be greatly impaired." Dingess* at 175 (emphasis supplied).

Similarly, DHS has failed to exhaust its administrative remedies by seeking a determination from the OSC and/or the MSPB. For example, DHS could have sought an official opinion from the OSC but chose not to avail itself of this readily available administrative procedure.

Upon receipt of a charge from the OSC, the MSPB is statutorily required to afford a State and/or its employee with written notice and an evidentiary hearing. *See*, 5 U.S.C. § 1505. The MSPB has, pursuant to rulemaking authority granted to it by Congress, determined that it has original jurisdiction over complaints regarding violations of the Hatch Act, 5 C.F.R. 1201.121, and has further required that the quantum of proof in Hatch Act cases to be a preponderance of evidence standard rather than the substantial evidence standard applicable to proceedings before the CSRB. *See*, 5 C.F.R. 1201.56(a)(ii) and compare to Utah Code Ann. § 67-19a-406(2)(c) (1996). After the evidentiary hearing is concluded, the MSPB must determine if a violation of the Hatch Act has occurred and then determine whether or not the employee should be removed from his/her position. *See*, 5 U.S.C. § 1505. Congress did not give MSPB the authority (in 5 U.S.C. § 1505) to impose a lesser disciplinary sanction (*e.g.*, demotion or suspension) but simply requires the MSPB to determine, up or down, whether an employee should be terminated from his/her employment. *See*, *Special Counsel v. Blackburne*, 58 MSPR 279, 282 (MSPB 1993).[5] Thus, Congress did not

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[5] The State of Utah has some prior experience with litigation regarding the Hatch Act. In *State of Utah v. United States Civil Service Commission*, 286 F.2d 30 (10th Cir. 1961), *cert. denied*, 366 U.S. 918 (1961), the Tenth Circuit affirmed the Civil Service Commissioner's decision ordering certain Utah Road Commission employees be dismissed for violating the Hatch Act but the Commission dismissed the allegations against the Road Commission Secretary (a Mr. Allred) based upon its "administrative discretion." In affirming the Commission's dismissal of the allegations against Mr. Allred, the Tenth Circuit cited *Oklahoma* as the underpinning therefore:

> "In determining whether the affirming judgments of the trial court are clearly erroneous, we must remember that while judicial review extends to both law and fact, 'Congress

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grant the MSPB with discretionary authority to impose a lesser disciplinary sanction in contrast to the Utah Legislature's granting of authority to the CSRB to impose an intermediate disciplinary sanction (such as demotion/suspension) under Utah Code Ann. § 67-19-18 (1995).

After entry of an order by the MSPB, both the State and/or its employee have the right to seek judicial review in the Federal District Courts. *See,* 5 U.S.C. § 1508. If dissatisfied with the decision by the Federal District Court Judge, the State and/or its employee have the statutory right to appeal the Federal District Court Judge's decision through the standard federal appellate process up to and including seeking certiorari with the U.S. Supreme Court. *Id.*

When the Hatch Act was initially enacted by Congress and signed into law by President Franklin D. Roosevelt in 1939, Congress recognized that the MSPB (through its predecessor – the Civil Service Commission) had unique expertise in this arena. Moreover, President Franklin D. Roosevelt, in regards to the Hatch Act opined:

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entrusted to the Commission the administration of the Act, under defined policies and established standards.' *State of Oklahoma v. United States Civil Service Commission*, 153 F.2d 280, 283 (10th Cir. 1946). And review 'is limited to an examination into whether or not the Commission abused its discretion in the order of removal.' *State of Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 145, 67 S.Ct. 544, 555, 91 L.Ed. 794 (same case affirmed)." *State of Utah v. United States Civil Service Commission*, 286 F.2d 30, 34 (10th Cir. 1961), *cert. denied*, 366 U.S. 918 (1961).

> "Furthermore, in applying to all employees of the Federal Government (with a few exceptions) the rules to which the civil-service employees have been subject for many years, this measure is in harmony with the policy that I have consistently advocated during all my public life, namely, the wider extension of civil service as opposed to its curtailment . . .
>
> . . . It is obvious that the intent of the bill is to follow broadly the provisions of civil service regulation that have existed for many years in regard to political activities of Federal employees." Message from the President of the United States relating to SB 1871, An Act to Prevent Pernicious Political Activities[6], 76th Congress 1st Sess., Doc. No. 105, 1-2.

Senator Hatch, in his report from Committee, wrote:

> "Section 9 is a restatement of the law now in effect as regards civil service employees. It provides in almost the exact language of the civil-service rule that it shall be unlawful for any person employed in any administrative or supervisory capacity of any agency of the Federal Government to use his official authority for the purpose of interfering with an election or affecting the result thereof.
>
> In effect, this is also a restatement of the provisions of section 2 of the act, except that it includes an additional penalty – that of removal from the position or office held by him. It also prohibits such persons from taking active part in

[6] The Hatch Act was previously called "An Act to Prevent Pernicious Political Activities."

> political management or in political campaigns just as the civil-service rules now provide." Senate Report No. 221, 76th Congress 1st Sess., 2 (March 28, 1939).

The lower Federal Courts have also noted Congressional recognition of the MSPB's expertise:

> "The applicability of the variously phrased prohibitions of the Hatch Act to particular conduct is frequently fraught with doubt, *and the reason Congress entrusted enforcement of the Act exclusively to the Civil Service Commission was because of its long history of functioning in this area and the corresponding expertise it had acquired in divining and applying the reach of the Congressional purposes vis-à-vis prohibited political activity.* Enforcement by the Commission only after hearing may mean, in one case, that there is no adverse application of the statute to complain of, and, in the next, that the constitutional issue goes before the court on a fully developed record. *It is not irrational for both Congress and court to think that the virtues of this approach in terms of the most efficient employment of judicial resources* are to be weighed in the balance as against the claims even of the First Amendment." *Dingess v. Hampton* at 174.

As demonstrated above, Congress created a pervasive scheme of federal regulation when it enacted the Hatch Act: an administrative process delegated to the agency (the MSPB) with expertise and judicial review in the Federal Courts. Petitioner submits Congress thus intended to preempt State legislation and State Court jurisdiction with respect to any potential activity prohibited by the Hatch Act.

3. Implied Conflict Preemption. In *English*, this Court identifies two independent types of implied conflict preemption:

> "[S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is [1] impossible for private party to comply with both state and federal requirements, or [2] where state law "stands and as obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79 (internal citations omitted) (bracketing supplied).

Thus, Congressional intent to preempt state law exists if it is (1) impossible to comply with both state and federal law, or (2) state law acts as an obstacle to accomplish the full purpose and objectives of Congress.

Although Utah has adopted a "little hatch act," it does not conflict with the Hatch Act but rather gives the appropriate deference to the same.[7] Petitioner's constitutional

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[7] The Hatch Act deals only with circumstances involving federal funds and not state funds. *See*, 5 U.S.C. § 1504 (Federal agencies must report improper use of federal funds by state/local employers to Office of Special Counsel for investigation). It also seems rather obvious that Congress does not have constitutional authority to regulate partisan political activity involving only state funding sources because Congress would necessarily be invading the "sovereign rights" of states in contravention of the Tenth Amendment wherein the Framers explicitly reserved all rights to the states not explicitly granted to the federal government. Thus, the Court held some forty-seven (47) years ago that the Hatch Act did *not* violate the Tenth Amendment. *See, generally, Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947). Thus, in the context of partisan politics involving state funding, the Utah Legislature has the authority to enact appropriate statutes and the Legislature has, in fact, done so in Utah Code Ann. § 67-19-19 (2004) (herein the Utah Hatch Act). Unlike the Hatch Act, the Utah Hatch Act

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due process rights afforded to him as a career service employee under the United States and Utah Constitutions conflict with the Hatch Act. For example, the Utah Legislature has clothed the CSRB with statutory authority to impose an intermediate disciplinary sanction other than dismissal from employment. *See*, Utah Code Ann. § 67-19a-408(2), Utah Admin. Code R. 137-1-21(3)(b) (2004). In so doing, the Utah Legislature has recognized Petitioner's constitutional due process rights to receive proportionate discipline under State law. *See*, *Lunnen v. Utah Department of Transportation*, 886 P.2d 70 (Utah Ct. App. 1994). That proportionate due process right, however, conflicts with the purpose and scope of the Hatch Act which *only* permits an "up or down" decision regarding termination of employment.[8] Specifically, in 5 U.S.C. § 1505, Congress

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explicitly permits partisan candidacies. *See*, Utah Code Ann. § 67-19-19(1)(a-c) (2004). In Section 3(b) of the Utah's "little hatch act," the Utah Legislature deferred to the Hatch Act when federal funds are at issue, to-wit:

> "**67-19-19. Political activity of employees – Rules and regulations – Highway patrol – Hatch Act**. . . .
>
> (3) Nothing contained in this section may be construed to:
>
> . . .
>
> (b) permit partisan political activity by any state employee who is prevented or restricted from engaging in the political activity by the provisions of the Hatch Act."

[8] The New York Intermediate Court of Appeals has held that a merit county/state employee, once ordered to be discharged by the MSPB, cannot thereafter utilize a grievance process afforded by state law because permitting pursuit of a grievance would frustrate the purpose of the Hatch Act:

> "We further conclude that the arbitration of this grievance would offend public policy (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman*, 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943; *Matter of Board of Educ. of Ramapo Cent. School Dist. [Ramapo Teachers' Assn.]*, 200

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delegated to the MSPB the discretionary authority to determine when removal of an employee as a penalty for violating the Hatch Act is warranted. However, Congress did not give to the MSPB the same discretion that was granted to the CSRB by the Utah Legislature authority to impose a lesser discipline, i.e. demotion or suspension. As such, Petitioner respectfully submits that Congress intended to preempt State law when it enacted the Hatch Act and the CSRB correctly determined that DHS was without legal authority to terminate Petitioner's employment for allegedly violating the Hatch Act.[9]

Allowing DHS or the CSRB to determine whether termination of Petitioner's employment is warranted under the Hatch Act directly conflicts with the Hatch Act's

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A.D.2d 62, 611 NY.S.2d 962, *lv. denied* 84 N.Y.2d 806, 621 N.Y.S.2d 515, 645 N.E.2d 1215). The Hatch Act was adopted to insure that the civil service is free of the influence of partisan politics and that those administering funds for national needs abstain from active political partisanship (*see, Oklahoma v. United States Civ. Serv. Commn.*, 330 U.S. 127, 143, 67 S.Ct. 544, 553, 91 L.Ed. 794). The only penalties for violating said Act are either removal from office or employment, or the subsequent loss of Federal funds (*see*, 5 U.S.C. § 1505[2]; § 1506). *In contrast, under the subject collective bargaining agreement, an arbitrator has a range of disciplinary options he or she can impose that are much less severe than dismissal. Consequently, to permit this matter to proceed to arbitration would significantly lessen the efficacy of the Hatch Act and frustrate its purpose and scope* (*see, Fela v. United States Merit Sys. Protection Bd.*, 730 F.Supp. 779)." *In the Matter of Blackburne*, 625 N.Y.S.2d 705, 707 (N.Y. App. Div. 1995) (Emphasis supplied).

[9] The CSRB's organic statutes do not appear to grant the CSRB authority to enforce federal law. *See*, Utah Code Ann. § 67-19a-202(1)(b) (1996) ("the board has no jurisdiction to review or decide *any other personnel matters*"). As a general proposition, Petitioner would respectfully submit that federal agencies are the sole enforcer of federal law.

delegation of discretion to the MSPB. This Court has previously recognized that Congress gave the MSPB the sole discretion to determine whether the facts warrant termination of an employee's employment:

> "'The court shall affirm the Commission's determination or order, or its modified determination or order, if the court determines that the same is in accordance with law.' As the facts were stipulated and no objection has been taken to the findings of fact, D.C., 61 F. Supp. 355, 357(5); 10th Cir., 153 F.2d 280, 283, *the attack, on this issue, is limited to an examination into whether or not the Commission abused its discretion in the order of removal.* As heretofore stated, the provisions for review underwent changes during the passage of the act.[FN24] As finally adopted, however, the reviewing court is directed to remand when it determines that the action of the Commission 'is not in accordance with law.'s 12(c)[FN25] *The question of 'the removal of the officer or employee,'s 12(b), note 1, supra, we think is a matter of administrative discretion.*" *State of Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 145, 67 S.Ct. 544, 554-555 (1947) (internal citations omitted).[10]

In *Oklahoma*, this Court reviewed an order of the CSC (the MSPB's predecessor) determining there was a Hatch Act violation warranting removal and ordering the State employee either be removed from employment or the State

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[10] The language in the 1940 version of the Hatch Act, "The Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by which it was committed from his office or employment," is currently located at 5 U.S.C. § 1505(2).

of Oklahoma would be subject to the loss of federal funding as prescribed by the Hatch Act. In fact, this Court noted the standard of review regarding the MSPB's decision regarding termination is abuse of discretion. *Id.*

Further, Congress' delegation of discretion to the MSPB achieves the purpose of consistent application[11] of the Hatch Act, as reported by Senator Hatch, to-wit:

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[11] Footnote thirteen (13) to the CSRB's Decision (App. 45-46) highlights the danger of potential inconsistent treatment involving the Hatch Act unless the expertise properly remains with the MSPB:

> "Fn 13. The very real danger of inconsistent departmental determinations regarding violations of the Federal Hatch Act are amply exemplified by DHS' own inconsistent treatment of individuals running for or holding partisan elective office in potential violation of the Federal Hatch Act. The evidentiary record undisputedly establishes that Mr. Hughes was treated differently from four other individuals who were either candidates for, or actually elected to, partisan political office while employees of DHS. Three of these individuals were never asked to resign after declaring their candidacy for partisan elective office. (Departmental Memorandum in Opposition to Summary Judgment at 10-12) One of these individuals was asked to resign only after he won election to the Utah State Senate in 1996. (*Id.*) Another individual was not asked to resign by DHS even after winning election to the Utah State House of Representatives because DHS did not believe this individual's position was funded by federal funds.
>
> Ostensibly because Mr. Hughes prevailed in the evidentiary hearing in this matter, the issue of due process consistency is not an issue before the Board at this time; however, the Board notes its deep concern regarding DHS' inconsistent treatment of Mr. Hughes in this case. It believes that the problems exemplified by DHS' admitted inconsistent treatment of employees in connection with the Hatch Act are remedied by allowing the federal agencies entrusted with oversight and enforcement to make violation determinations." R. 001420.

> "In cases where violations of the foregoing provisions occur, amounts are to be withheld from loans or grants which would otherwise be payable to State and local agencies. *In order to secure consistent and uniform administration of the provisions for withholding such amounts, the bill provides that the Civil Service Commission shall determine the amounts to be withheld in all cases.* If any Federal agency which makes loans or grants of funds of the United States to State or local agencies has reason to believe that a violation of the section has occurred in connection with any activity for which it makes loans or grants, such Federal agency is to make a report with respect thereto to the Civil Service Commission. Upon receipt of any such report, or when it has any other information which it deems to warrant an investigation, the Commission is to determine whether a violation of the section has occurred." 76th Congress 3d Sess., Senate Report No. 1236, 3.

The Utah Supreme Court's partial reliance on Utah State Administrative Codes as a primary basis to support the termination of Petitioner's employment reveals the conflict between the Hatch Act and state law. An illustrative example is set forth in the Utah Supreme Court's citation of the administrative rule in effect at the time of Petitioner's termination – R. 477-9-4(5) & (6) (2004) – which authorizes the Executive Director of the Department of Human Resource Management (herein DHRM) to investigate an alleged violation of the Hatch Act. App. 88-89. Although the Utah Supreme Court's decision below makes no substantive comment therein, Petitioner invites this Court's attention to the fact that DHRM has subsequently modified R. 477-9-4(5) & (6) (2006) by removing DHRM's

investigative authority and providing that Utah State agencies should terminate the employment of any employee found to be in violation of the Hatch Act by the MSPB. App. 90-91. Significantly, the Utah Supreme Court relied on, and referred to, the 2004 version of DHRM R. 477-9-4(5) & (6). App. 12. The Utah Supreme Court also interpreted the 2004 version of the DHS Conflict of Interest Policy[12] as providing the DHS with the independent authority to determine whether a Hatch Act violation occurred even though DHS' policy necessarily conflicts with the investigative authority of the OSC and the enforcement authority of the MSPB.

CONCLUSION

Petitioner respectfully requests this Court grant a writ of certiorari to review the decision of the Utah Supreme Court and thereafter hold that the Hatch Act preempts any state agency or state court from enforcing the Hatch Act because the Hatch Act grants sole and exclusive authority to make such determinations to the Merit Systems Protection Board. Thus, Petitioner

[12] In the CSRB's decision, the CSRB noted the pertinent part of DHS' Conflict of Internal Policy provided as follows:

> "Hatch Act: During work time or during off time, when an employee's principle activity is directly related to a federally-financed program (even if their salary is not paid by the federal program), employees may not: 1) use their position and authority to influence or affect the outcome of an election or nomination; 2) coerce other employees to make contribution for political purposes; or 3) be a candidate for a political office. (See: Hatch Act and Attorney General's Opinion No. 92-18 dated July 27, 1995.)" App. 49.

respectfully submits that the Hatch Act preempts state law in his circumstance and this Court should so hold.

Respectfully Submitted,

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APPENDIX

156 P.3d 820

Supreme Court of Utah.

UTAH DEPARTMENT OF HUMAN SERVICES,
Petitioner,
v.
Brent N. HUGHES and Career Service Review Board,
Respondents.
No. 20050610.

March 27, 2007.

Mark L. Shurtleff, Att'y Gen., Debra J. Moore, J. Clifford Petersen, Asst. Att'ys Gen., Salt Lake City, for petitioner.

Phillip W. Dyer, Carey A. Seager, Salt Lake City, for respondent Hughes.

Robert W. Thompson, Salt Lake City, for respondent Review Board.

On Certification from the Utah Court of Appeals

DURRANT, Justice:

INTRODUCTION

¶ 1 This case concerns the Hatch Act (or the "Act"), a federal statute that prohibits state employees whose principal activity is directly related to a federally financed program from running for elective office.[1] Respondent Brent Hughes was terminated by the Utah Department of Human Services (the "Department") from his position as a collections/compliance supervisor based on the Department's

[1] 5 U.S.C. §§ 1501-1508 (2002).

determination that he had violated the Hatch Act by running for a seat in the Utah House of Representatives.

¶ 2 On appeal, the Utah Career Service Review Board (the "State Board") rescinded the Department's letter terminating Hughes. The State Board held that the federal Hatch Act preempts state law, including agency rules and policies, and that only the federal Merit Systems Protection Board (the "Federal Board") can make final determinations regarding alleged Hatch Act violations. Thus, the State Board concluded that the Department exceeded its authority in determining that Hughes violated the Hatch Act. Additionally, the State Board noted that Hughes had been treated differently from other employees, in potential violation of his due process rights.

¶ 3 We hold that, in enacting the Hatch Act, Congress did not intend to preempt state law. Indeed, the Hatch Act's very purpose is to provide an incentive for states to comply with its provisions and help achieve its overarching goals. Accordingly, state agencies may voluntarily comply with the Hatch Act and make independent determinations regarding perceived violations of the Act with respect to their employees. We therefore reverse the State Board's decision and remand so that the State Board may determine the sufficiency of Hughes's due process claim.

BACKGROUND

¶ 4 On March 17, 2004, a few months before his termination, Brent Hughes filed his candidacy to run for a seat in District 20 of the Utah House of Representatives. On June 18, 2004, Hughes was terminated from his employment as a collections/compliance supervisor in the Office of Recovery Services in the Utah Department of Human Services

due to his failure to respond to the Department's request that he comply with the federal Hatch Act and the Department's conflict of interest policy.

¶ 5 The Department's conflict of interest policy provided as follows: "During work time or during off time, when an employee's principal activity is directly related to a federally-financed program . . . employees may not . . . be a candidate for political office." This policy explicitly referred to the Hatch Act, which prohibits state employees whose principal activity is directly related to a federally financed program from running for elective office. Additionally, in 2004, agency rules gave the executive director authority to investigate the validity of any alleged Hatch Act violations[2] and terminate an employee for "adequate cause"[3] in accordance with certain statutory procedures.[4] Also, as part of every federal grant received by the Department, the Executive Director signed an agreement certifying that the Department would comply with the Hatch Act.

¶ 6 Hughes had been employed by the State since October 1979. On or about March 17, 2004, the Department learned that Hughes was a candidate for political office. Hughes's position with the Department's Office of Recovery Services was financed in whole or in part by federal funds, like most positions within the office.

¶ 7 On May 7, the Department advised Hughes that his candidacy violated the Hatch Act and gave him one week

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[2] Utah Admin. Code r. 477-9-4(6) (2004) (amended 2006).

[3] *Id.* r. 477-11-2(2)(d) (2007).

[4] *See* Utah Code Ann. § 67-19-18 (2006).

to comply with the Hatch Act by resigning his employment or withdrawing his candidacy. On May 13, the Department offered Hughes a third option of taking an unpaid leave of absence, pending the result of the election. The next day, Hughes asked for clarification of what would happen if he did not select one of the three options. The Department informed Hughes that his employment would be terminated if he failed to select one of the three options and gave Hughes until May 21 to make his decision.

¶ 8 Hughes did not exercise any of the above options, and on June 1, 2004, the Department issued him a notice of intent to dismiss. The notice stated that the reason for dismissal was "malfeasance," consisting of violating the Department's conflict of interest policy and failing to advance the good of the public service by deliberately violating the Hatch Act.[5]

¶ 9 Hughes requested and received a pretermination hearing before Executive Director Arnold-Williams. On June 18, 2004, Arnold-Williams officially terminated Hughes's employment.

¶ 10 Hughes appealed his termination to the Career Service Review Board. An evidentiary hearing was then held before a State Board hearing officer. At the conclusion of the Department's case-in-chief, Hughes moved for a directed verdict, based in part on his due process claim that the Department had applied the Hatch Act inconsistently, treating him differently from other employees. The hearing officer denied the motion, concluding that, among

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[5] *See id.* § 67-19-18(1)(a)-(b) (stating that career service employees may be dismissed "to advance the good of the public service" or "for just causes such as . . . malfeasance").

other things, any inconsistent treatment was because Hughes's circumstances were different than those of previous employees.

¶ 11 In his November 2, 2004 Findings of Fact, Conclusions of Law, Decision and Order, the hearing officer reversed the Department's decision to terminate Hughes's employment, holding that the Department was not authorized to enforce the Hatch Act and therefore had not met its burden of showing a Hatch Act violation. He concluded that "[o]nly the United States Merit Systems Protection Board can make a determination that a party . . . 'absolutely, definitely, specifically, etc.' violated the Hatch Act," and that the executive director's saying a party violated the Hatch Act "does *not* make it so." The hearing officer also found that Hughes's violation of the Department's conflict of interest policy was premised on a violation of the Hatch Act. This finding was based upon testimony from Arnold-Williams, who specifically testified during cross-examination that if there had been no alleged violation of the Hatch Act, there would have been no other basis for discipline. Additionally, the hearing officer again rejected Hughes's due process claim that the Department treated him differently from other employees, concluding that Hughes's claim was not sustainable.

¶ 12 Because the hearing officer found that the Federal Board had exclusive jurisdiction to determine whether a Hatch Act violation had taken place, he held that the State had "*not* met its burden to show that the [Department] complied with all relevant statutory and administrative requirements as to showing 'adequate cause' when terminating [Hughes's] employment." He therefore rescinded the Department's Final Decision-Dismissal letter of June 18, 2004.

¶ 13 The Department appealed the hearing officer's decision to the State Board. The Department argued that the Federal Board does not have exclusive authority to determine violations of the Hatch Act and that the hearing officer erred in requiring that the Federal Board determine that the Hatch Act had been violated before the Department could terminate an employee for violating the Department's conflict of interest policy. The State Board heard oral argument and then issued its Decision and Final Agency Action on June 17, 2005, affirming the decision of its hearing officer. The State Board noted, however, its "deep concern" that Hughes had been treated differently from other employees who had allegedly violated the Hatch Act.

¶ 14 The Department appealed the State Board's final agency decision to the Utah Court of Appeals pursuant to Utah Code section 78-2a-3(2)(a). The Utah Court of Appeals certified this case to us, and we have jurisdiction pursuant to Utah Code section 78-2-2(3)(b).

STANDARD OF REVIEW

¶ 15 The Career Service Review Board's final agency decision raises "general questions of law"; therefore, we apply a correctness standard, granting no deference to the agency's decision.[6]

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[6] *Associated Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291.

ANALYSIS

¶ 16 The federal Hatch Act directly regulates the political activity of federal employees and indirectly regulates the political activity of certain state and local government employees.[7] It covers state and local employees "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by [the federal government]."[8] The Hatch Act's primary language states that such employees "may not . . . be a candidate for elective office."[9] The Hatch Act authorizes the federal government to withhold funding to state agencies where agencies or their employees fail to comply with the Act.[10]

¶ 17 It is clear that Hughes, whose principal employment was financed in whole or in part by federal funds, violated the Hatch Act when he filed his candidacy to run for elective office. Thus, the key issue in this case is whether the Department may voluntarily comply with the Hatch Act by making independent personnel decisions based on perceived violations of the Act. In other words, does the Hatch Act preempt state law, leaving jurisdiction solely to the federal Merit Systems Protection Board to make final determinations regarding alleged violations of the Act?

¶ 18 We hold that the Hatch Act does not preempt state law. Thus, the Department may voluntarily comply with the Hatch Act and make personnel decisions accordingly.

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[7] *See* 5 U.S.C. §§ 1501-1508 (2002) (pertaining to "Political Activity of Certain State and Local Employees").

[8] *Id.* § 1501(4).

[9] *Id.* § 1502(a)(3).

[10] *See id.* § 1506.

Moreover, we hold that the State Board has authority to review such decisions made by the Department or any other state agency.

¶ 19 We will first discuss enforcement of the Hatch Act and how it relates to the issue of federal preemption. Second, we will discuss the congressional intent in passing the Hatch Act and how the State Board's decision is at odds with the Act's overall purposes. Finally, we will briefly discuss Hughes's due process claim, which we remand to the State Board for further consideration.

I. ENFORCEMENT PROVISIONS OF THE FEDERAL HATCH ACT

¶ 20 The Hatch Act authorizes the federal Office of Special Counsel (the "OSC") to prosecute alleged violations of the Act.[11] Such violations occur when federal employees or, as in this case, certain state employees engage in political activity prohibited by the Act. The OSC investigates reports of alleged violations filed by federal and state agencies, or even the public,[12] and then presents its findings and any charges based on those findings to the Merit Systems Protection Board.[13] After an opportunity for a hearing before the Federal Board, in which the relevant employee and state agency are entitled to appear, the

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[11] *Id.* § 1504.

[12] *See id.* ("When a Federal agency . . . has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report *or on receipt of other information which seems to the Special Counsel to warrant an investigation,* the Special Counsel shall investigate." (emphasis added)).

[13] *Id.*

Federal Board determines whether a violation has occurred and whether the violation warrants the employee's removal from his or her employment.[14] If the Federal Board determines a violation has occurred that warrants the employee's removal, it notifies the offending employee and state agency of its final determination and orders the removal of the employee.[15] The state agency must then comply with the Federal Board's removal order or risk the loss of federal funding.[16] If the state agency does not remove the offending employee from his or her employment within thirty days after notice from the Federal Board, the Federal Board certifies an order to the appropriate federal agency requiring it to withhold from its loans or grants to the noncomplying state agency an amount equal to two years' pay at the rate being received by the offending employee at the time of the violation.[17]

¶ 21 The State Board erroneously concluded that this federal enforcement scheme preempted state law. We now reverse the State Board's decision because such federal preemption is at odds with the congressional intent and overall purposes of the Hatch Act. In the next section, we will discuss federal preemption, the intent and purposes of the Hatch Act, and the fundamental inconsistencies of the State Board's decision.

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[14] *Id.* § 1505(1)-(2).

[15] *Id.* § 1505(3).

[16] *See id.* § 1506.

[17] *Id.* § 1506(a)(1)-(2). Additionally, the Federal Board may order the withholding of funds to the initial state agency if "the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency." *Id.* § 1506(a)(2).

II. THE HATCH ACT DOES NOT PREEMPT STATE LAW

¶ 22 The United States Supreme Court has identified two types of federal preemption-express and implied.[18]

Express preemption, often referred to as "complete preemption," exists where a federal statute states an intent to preempt state law. By contrast, the Supreme Court has recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. These scenarios of implied preemption have acquired their own labels and have become known as "field preemption" and "conflict preemption," respectively.[19]

¶ 23 The State Board based its decision on an implied field preemption analysis. Thus, we discuss only briefly express preemption and implied conflict preemption and their application to the Hatch Act in this case. We will then discuss implied field preemption as it relates to the Department's authority to independently determine violations of the Hatch Act and voluntarily comply with its provisions.

A. There Is No Express Preemption of State Law

¶ 24 Express preemption occurs "when the language of the federal statute reveals an express congressional intent

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[18] *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

[19] *Utah Div. of Consumer Prot. v. Flagship Capital*, 2005 UT 76, ¶ 11, 125 P.3d 894 (internal quotation marks and citations omitted).

to preempt state law."[20] The Hatch Act contains no explicit statement "delivered in a clear congressional voice"[21] that reflects an intent to preempt state law, including agency rules and policies regarding the political activity of state employees. Indeed, we recently noted that the United States Supreme Court has found express preemption in only two circumstances, neither of which involved the Hatch Act.[22]

B. There Is No Implied Conflict Preemption of State Law

¶ 25 State law is also preempted to the extent that it actually conflicts with federal law. "Thus, the [United States Supreme] Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[23] In this case, Utah law, including the Department's rules and policies regulating employee political activity, is not incompatible with the Hatch Act. Indeed, Utah has adopted its own "little Hatch Act," which requires state compliance with the federal version.[24] Additionally, the Department's rules and policies

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[20] *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir.1998).

[21] *Flagship Capital*, 2005 UT 76, ¶ 13, 125 P.3d 894.

[22] *Id.* ¶ 12 (noting express federal preemption in "certain causes of action under the Labor Management Relations Act of 1947 and the Employee Retirement Income Security Act of 1974 (ERISA)" (citations omitted)).

[23] *Id.* ¶ 21 (quoting *English*, 496 U.S. at 79, 110 S.Ct. 2270).

[24] *See* Utah Code Ann. § 67-19-19(3) (2006) ("Nothing contained in this section may be construed to: . . . permit partisan political activity

(Continued on following page)

specifically refer to the Hatch Act, requiring employee compliance with its provisions. Furthermore, in 2004, the Department's Executive Director had authority, under Utah statutory law, to investigate the validity of any alleged Hatch Act violations[25] and to terminate an employee for "malfeasance,"[26] which may include the employee's failure to comply with the Department's policies regarding political activity prohibited by the Act. These statutes and policies are entirely consistent with the Hatch Act's primary purpose and do not conflict with its overall enforcement scheme.

C. There Is No Implied Field Preemption of State Law

¶ 26 In discussing implied field preemption, the United States Supreme Court has explained as follows:

> [I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which federal interest is so dominant that the federal system will

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by any employee who is prevented or restricted from engaging in the political activity by the provisions of the federal Hatch Act.").

[25] Utah Admin. Code r. 477-9-4(6) (2004) (amended 2006).

[26] Utah Code Ann. § 67-19-18(1)(b) (2006).

> be assumed to preclude enforcement of state laws on the same subject.[27]

¶ 27 The State Board rested its decision on an implied field preemption analysis, holding that the Hatch Act preempts state law because it "creates a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for States to supplant it.' "[28] The State Board observed that the Hatch Act "exclusively charges federal agencies with a duty to report suspected Federal Hatch Act violations to the OSC."[29] Then, the OSC "exclusively must do an investigation and report its findings to [the Federal Board]. If [the] OSC concludes that a violation has occurred, it must file charges with the [Federal Board] . . . , [which] is statutorily required to afford a state and/or its employee an evidentiary hearing."[30] Furthermore, the State Board noted that the Federal Board "has jurisdiction over complaints regarding violations of the Federal Hatch Act and has further required that the standard of proof in Federal Hatch Act cases be a preponderance of the evidence standard."[31] This evidence standard "differs significantly from the substantial evidence standard the Department is required to prove before the [State Board]."[32] The State Board finally noted that the federal courts have jurisdiction

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[27] *English*, 496 U.S. at 79, 110 S.Ct. 2270 (internal quotation marks and citations omitted).

[28] Hughes, 8 CSRB 80 (2005) (final agency decision) (quoting *Barnett Bank v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996)).

[29] *Id.* (citing 5 U.S.C. § 1504 (2002)).

[30] *Id.* (citing 5 U.S.C. §§ 1504-1505).

[31] *Id.*

[32] *Id.*

over appeals from the ultimate findings of the Federal Board.[33] Thus, the State Board concluded that, in light of these factors, the Hatch Act impliedly preempted state law through a pervasive federal scheme.[34] As a result, the State Board held that "the Department exceeded its authority in determining that Mr. Hughes violated the Federal Hatch Act."[35] We disagree.

¶ 28 In enacting the Hatch Act, Congress did not intend to create a pervasive federal scheme or dominate an entire field so exclusively as to preempt state law. Accordingly, state agencies may make independent determinations regarding perceived violations of the Act and voluntarily comply with its provisions in order to remain eligible for federal funding.

1. Congress Intended that States Voluntarily Comply with the Hatch Act

¶ 29 In *Oklahoma v. United States Civil Service Commission,*[36] the United States Supreme Court stated that "[t]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship."[37] Thus, "Congress effectively designed the Hatch Act to combat demonstrated ill effects of Government

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947).

[37] *Id.* at 143, 67 S.Ct. 544.

employees' partisan political activities."[38] With respect to the federal government, and the States by virtue of its spending power, Congress intended to foreclose the potential for political corruption and assuage the public's fear of political bias within federal, state, and local governments.[39] Additionally, Congress intended that advancement in government service "not depend on political performance" and that employees "would be free from pressure . . . to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs."[40] Thus, Congress used its spending power relative to the States in order to withhold federal money from state agencies whose employees do not comply with the Hatch Act's provisions, such as, in this case, by running for elective office while employed in a position funded in whole or in part by federal money.

¶ 30 The Hatch Act is not an exercise of any enumerated power to regulate state and local political activity-indeed,

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[38] *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 471, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

[39] *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565-66, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) ("A major thesis of the Hatch Act is that to serve this great end of Government-the impartial execution of the laws-it is essential that federal employees, for example, not take formal positions in political parties, . . . and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government."); *id.* ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."); *id.* ("Another major concern . . . was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine.").

[40] *Id.* at 566, 93 S.Ct. 2880.

because there is no such power, such regulation would be unconstitutional.[41] The overall scheme of the Hatch Act simply provides monetary incentives for states to comply with its provisions and help achieve the Act's stated purposes. As a result, the regulatory field that the Hatch Act occupies in relation to the States relates to the enforcement of this federal funding scheme. The Federal Board is given authority to withhold federal funding when it (1) determines that the Hatch Act's provisions have been violated by a federally funded state employee, (2) concludes that removal of the employee is warranted, (3) orders the state agency to remove the employee, and (4) the state agency does not comply with the removal order. Hence, the "enforcement" of the Hatch Act, as it relates to the States, is limited to this narrow authority to withhold federal funding for noncompliance.

¶ 31 Therefore, where a state agency makes a personnel decision based on an independent determination of a perceived Hatch Act violation, it is not "enforcing" the Hatch Act. A state agency is instead enforcing its own rules and policies, which may utilize provisions of the Hatch Act in order to achieve compliance with the Act and remain eligible for federal funding. A state agency is not treading upon federal authority reserved solely for the OSC or the Federal Board-a state agency has no authority to prosecute alleged violations of the Act or make findings

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[41] *See Oklahoma*, 330 U.S. at 143, 67 S.Ct. 544 (stating that, with respect to the Hatch Act, "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, [but] it does have the power to fix the terms upon which its money allotments to states shall be disbursed").

under the Act that will ultimately determine on what terms a state agency may receive federal funds.

¶ 32 The Utah Court of Appeals' opinion in *Utah Department of Corrections v. Despain*[42] is helpful in illustrating the way in which two separate governmental agencies can independently determine the same legal issue for different purposes. In *Despain,* the defendant, a prison guard employee for the Utah Department of Corrections, was terminated for assaulting his wife in violation of a departmental policy that prohibited "[a]ny act or conduct that constitutes a wrongful practice as defined by federal, state or local law."[43] The Department of Corrections determined that the defendant had violated state criminal law and as a result had violated its departmental policy.[44] On appeal, the Career Service Review Board found a factual basis for the assault allegations; however, the State Board rescinded the defendant's termination, concluding that because the defendant had not been convicted or even charged with assault, he did not violate the departmental policy.[45]

¶ 33 The Utah Court of Appeals reversed the State Board's decision, holding that "a policy violation does not require a conviction," and that "the facts indicate that [the defendant] violated [a state criminal statute] even though he was released after his arrest."[46] Thus, the state agency had authority, without a preceding criminal adjudication,

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[42] 824 P.2d 439 (Utah Ct.App.1991).

[43] *Id.* at 444.

[44] *Id.*

[45] *Id.* at 444-45.

[46] *Id.*

to independently assess federal or state law to determine whether its departmental policy had been violated and make a personnel decision accordingly. The state agency was not enforcing the criminal law, which remained the sole function of a federal or state prosecutor, but was rather determining that a violation of the criminal law had taken place relative to its own departmental policy.

¶ 34 In this case, the Career Service Review Board erred in holding that the Department must first obtain an advisory opinion from the OSC officially determining that Hughes had violated the Hatch Act before terminating his employment. As *Despain* illustrates, although within a criminal context, the Department in this case has authority, without a prior determination from the OSC or the Federal Board, to independently assess whether the Hatch Act was violated by an employee with respect to the Department's conflict of interest policy and to make personnel decisions accordingly. In doing so, the Department is not "enforcing" the Hatch Act and treading upon the federal roles reserved for the OSC and the Federal Board. Furthermore, the Hatch Act does not explicitly or implicitly require the Department, or any other state agency, to obtain an advisory opinion from either the OSC or the Federal Board before independently determining perceived violations of the Act with respect to federally funded employees.

2. The Career Service Review Board's Decision Is at Odds with the Congressional Intent of the Hatch Act

¶ 35 For us to hold, as did the State Board, that the Department did not have authority to assess whether the Hatch Act had been violated by one of its federally-funded

employees, we necessarily would have to conclude that Congress intended to preclude state agencies from voluntarily complying with the Hatch Act. As we have discussed above, this cannot be the case.

¶ 36 Under the State Board's holding, if a state agency becomes aware that its federally funded employee is a candidate for partisan elective office, it cannot take personnel action to protect against the potential loss of federal funding. Only the Federal Board would have authority to make final determinations regarding alleged violations of the Hatch Act. Thus, in this case, the agency's only recourse would be to wait and see if the Federal Board concludes that the Hatch Act was violated-and potentially face the costs of federal litigation and the possible withdrawal of federal funding. This is not what Congress had in mind when it passed the Hatch Act. And although an advisory opinion may be obtained before personnel action is taken, it is not required by the Act itself, and therefore, the potential availability of such an opinion does nothing to change our analysis.

¶ 37 Ultimately, if we were to adopt the interpretation offered by the State Board, we would have to conclude that, notwithstanding the congressional intent to encourage states to comply with the Hatch Act and assist in its overarching goals, Congress also intended to preclude states from voluntarily complying with the Hatch Act, or even guarding against potential violations. These two positions are fundamentally inconsistent. Thus, we reverse the State Board's decision and hold that the Hatch Act does not preempt state law.

III. HUGHES'S DUE PROCESS CLAIM

¶ 38 Finally, we address the question of whether Hughes's due process rights were violated in that he was treated differently from other employees. In the initial evidentiary hearing, the State Board's hearing officer rejected Hughes's claim that he was treated differently from other employees who had violated the Hatch Act, in violation of his due process rights. In its decision, however, the State Board noted that the "evidentiary record undisputedly establishes that Mr. Hughes was treated differently from four other individuals who were either candidates for, or actually elected to, partisan political office while employees of the Department." Unlike the hearing officer's decision, the State Board discussed specifically the different ways the Department treated previous employees that were in circumstances similar to Hughes:

> Three of these individuals were never asked to resign after declaring their candidacy for partisan elective office. One of these individuals was asked to resign only after he won election to the Utah State Senate in 1996. Another individual was not asked to resign by the Department even after winning election to the Utah State House of Representatives because the Department did not believe this individual's position was funded by federal funds.

¶ 39 Although the State Board stated that the due process issue was not before it on appeal because Hughes had prevailed in the evidentiary hearing,[47] the State Board

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[47] The Department argues that Hughes did not cross-appeal the hearing officer's finding with regard to his due process claim. As a

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noted its "deep concern regarding the Department's inconsistent treatment of Mr. Hughes in this case."

¶ 40 In contrast to an appellate court, the Career Service Review Board has some fact-finding authority in reviewing the initial decision of its hearing officer:

> The [State Board] shall first make a determination of whether the factual findings of the [State Board] hearing officer are reasonable and rational according to the substantial evidence standard. When the [State Board] determines that the factual findings of the [State Board] hearing officer are not reasonable and rational based on the [evidentiary] record as a whole, then the [State Board] may, in its discretion, correct the factual findings, and also make new or additional factual findings.[48]

¶ 41 Additionally, "[i]f issues . . . are . . . satisfactorily resolved, they may not qualify to be advanced further . . . and the [State Board] may refuse to hear or take action."[49] In this case, it is unclear whether the due process issue was "satisfactorily resolved" and whether the State Board

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result, the Department claims that the due process issue was not properly before the State Board and is not before us now. While it is true that Hughes did not specifically argue his due process claim on appeal to the State Board, he noted in his reply brief in that appeal that "if the [State Board] does not affirm the [hearing officer's] Decision on the grounds asserted in this Brief, [Hughes] asserts he should be entitled to submit supplement[al] briefing on the theories posed in [his] Motion [For A Directed Verdict]," which included his due process claim. Thus, it appears that Hughes made at least some attempt to preserve the due process claim in his reply brief to the Department's appeal to the State Board.

[48] Utah Admin. Code r. 137-1-22(4)(a)(2007).

[49] *Id.* r. 137-1-11.

made a new or corrected factual finding regarding Hughes's inconsistent treatment, and if so, whether this might be an alternative basis for its reinstatement order. Accordingly, we remand to the State Board to determine the sufficiency of Hughes's due process claim.

CONCLUSION

¶ 42 We reverse the Career Service Review Board's decision and hold that, consistent with congressional intent, the federal Hatch Act does not preempt state law. As a result, state agencies may voluntarily comply with the Hatch Act and make independent determinations regarding perceived violations of the Act with respect to their employees. We remand to the State Board, however, for further consideration of the sufficiency of Hughes's due process claim.

¶ 43 Chief Justice DURHAM, Associate Chief Justice WILKINS, Justice PARRISH, and Justice NEHRING concur in Justice DURRANT's opinion.

BEFORE THE STATE OF UTAH
CAREER SERVICE REVIEW BOARD

BRENT N. HUGHES, **Grievant and Respondent,** **v.** **UTAH DEPARTMENT OF HUMAN SERVICES,** **Agency and Appellant.**	**DECISION AND FINAL AGENCY ACTION** **Case No. 8 CSRB 80 (Step 6)**

On Thursday, April 14, 2005, the Career Service Review Board (Board and CSRB) held an administrative hearing in the above-referenced matter. The following Board Members were present at this hearing and heard oral argument: Blake S. Atkin, Chairman; Joan M. Gallegos, Kevin C. Timken, and Teresa Aramaki, Board Members. At this hearing, the Utah Department of Human Services (Department/Apellant/DHS) was represented by J. Francis Valerga, Assistant Utah Attorney General, who presented oral argument on Appellant's behalf. Accompanying Mr. Valerga were Kathryn Wilson, Paralegal, Office of the Utah Attorney General, and Jay Jensen, Human Resources Specialist, Department of Human Services. Mr. Brent Hughes (Mr. Hughes) was also present at this hearing and was represented by Phillip W. Dyer, Attorney at Law, who presented oral argument on Mr. Hughes' behalf. Also present were Merilee Hughes (Mr. Hughes' wife), and Mr. Hughes' son.

After this hearing, an executive session was held to deliberate on the Hearing Officer's Findings of Fact,

Conclusions of Law, Decision and Order (Step 5 Decision). At the beginning of this executive session, Board Member Aramaki recused herself from all deliberations based on a perceived conflict of interest. This executive session was adjourned without the Board reaching a final decision.

On Thursday, April 21, 2005, the Board again met in an executive session and completed its appellate review of this matter and closed the record. The following Board Members were present during this continued executive session: Blake S. Atkin, Chairman, Joan M. Gallegos, and Kevin C. Timken. Based upon these deliberations, the Board now issues this final decision sustaining the Hearing Officer's Step 5 Decision in this matter.

AUTHORITY

The Board's statutory authority is set forth in the *Utah Code* at §§67-19a-101 through -408 of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act at §§67-19-1 *et seq.* The CSRB's administrative rules are published in the *Utah Admin. Code* at R137-1-1 through -23. This Board-level or Step 6 appeal hearing is the final administrative review in the State Employees' Grievance and Appeal Procedures for Mr. Hughes' appeal from termination of his employment. Both the Board's evidentiary/Step 5 and these appellate/Step 6 proceedings are designated as "formal adjudications" pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB's Step 5 and Step 6 hearings. (*Utah Code Ann.* §§63-46b *et seq.*)

PROCEDURAL BACKGROUND

On June 1, 2004, Mr. Hughes was given notice of the Department's intent to dismiss (Notice of Intent) him from his employment with the Department as a Collection/Compliance Supervisor in the Office of Recovery Services (ORS).[1] (Agency Ex. 11; Step 5 Decision at 2, Finding of Fact 7.a.) This Notice of Intent was issued by Emma Chacon, Director, ORS (Ms. Chacon). Mr. Hughes signed as having received this Notice of Intent on June 1, 2004. At the time this Notice of Intent was issued, Mr. Hughes had been employed by the Department for more than 24 years. (September 29, 2004 Transcript (Tr.II) at 167; Grievant's Brief in Reply to Agency Step 6 Appeal Brief (Reply Brief) at 6 n.11)[2]

The June 1, 2004 Notice of Intent recommended that Mr. Hughes' employment be terminated for the good of the public service. (Agency Ex. 11) Specifically, the Department alleged that Mr. Hughes' candidacy for a seat in the Utah House of Representatives violated Chapter 15, Title 5 of the United States Code Annotated (U.S.C.A.) entitled: Political Activity of Certain State and Local Employees (Federal Hatch Act) and the Department's conflict of interest policy. (*Id.*) The Department further alleged that Mr. Hughes' conduct constituted malfeasance in violation of Utah Department of Human Resource Management rule R477-11-1. (*Id.*)

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[1] The Office of Recovery Services is a division of the Utah Department of Human Services.

[2] From Grievant's Reply Brief at n. 11, it appears that Grievant has been employed by the State for a total of 27 years with three of those years accrued from service outside of DHS.

Summarizing the allegations against Mr. Hughes in its Notice of Intent, the Department specifically stated: "As an employee of ORS and Child Support Services, you have violated the Federal Hatch Act by becoming a candidate and running for election to the Utah House of Representatives . . . I am therefore recommending your dismissal from ORS and from DHS for your willful violation of federal law, violation of DHS conflict of interest policy, and for the good of the public service." (*Id.*)

On June 8, 2004, Mr. Hughes filed a written response to the Department's Notice of Intent with Dr. Robin Arnold-Williams, Executive Director for the Department (Exec. Dir. Arnold-Williams) (Agency Ex. 12). In his response, Mr. Hughes specifically requested a hearing with Exec. Dir. Arnold-Williams and disputed the facts set forth in the Department's Notice of Intent because the Department had "refused to provide him with documentation establishing that his position was in fact covered by the 'Hatch Act'." (*Id.*) Finally, in his written response to the Department's Notice of Intent, Mr. Hughes renewed his request that the Department provide him with documentation establishing that his position was in fact covered by the Hatch Act and that he be allowed to utilize annual leave and converted sick leave "until all alternatives/issues had been examined and/or exhausted." (*Id.*)

On June 17, 2004, a hearing regarding the Department's Notice of Intent was held before Exec. Dir. Arnold-Williams. (Agency Ex. 14) On June 18, 2004, Exec. Dir. Arnold-Williams issued her *Final Decision – Dismissal* (Step 4 Decision) terminating Mr. Hughes' employment as a Collection/Employment Supervisor with ORS. (*Id.*) The effective date of Mr. Hughes' dismissal was June 18, 2004. (*Id.*)

In Exec. Dir. Arnold-Williams' written decision, she determined that there was adequate cause or reason to support the allegations against Mr. Hughes. Specifically, Exec. Dir. Arnold-Williams found that Mr. Hughes' candidacy for a seat in the Utah House of Representatives constituted a "violation of 5 U.S.C. Section 1502, also known as the Federal Hatch Act" and the Department's conflict of interest policies. (*Id.*) Exec. Dir. Arnold-Williams concluded that Mr. Hughes' conduct was willful and knowing and failed to "advance the good of the public interest." (*Id.*)

Thereafter, on June 22, 2004, Mr. Hughes timely filed his *Request for Agency Action and/or Alternatively Appeal to the Career Service Review Board from Final Agency Decision* (Appeal)[3] of Exec. Dir. Arnold-Williams Step 4 Decision with the CSRB. In his appeal, Mr. Hughes named the Utah Department of Human Services and the Utah Department of Human Resource Management (DHRM) as respondents.[4]

PROCEEDINGS BEFORE THE CAREER SERVICE REVIEW BOARD

In addressing the involved proceedings before the CSRB in connection with this matter, the Board makes

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[3] Mr. Hughes' Appeal as well as the various motions and memoranda in support or opposition of those motions are part of the file maintained and controlled by the CSRB office.

[4] Mr. Hughes named DHRM as a respondent for allegedly failing to establish administrative rules "governing the procedural and documentary requirements of disciplinary dismissals" as statutorily required and for allegedly failing to perform it statutorily mandated "watchdog" responsibilities under *Utah Code Ann.* § 67-19-8(4). (Appeal at 4-5)

special note of the numerous motions, and the memoranda supporting and opposing these motions, filed in this case. As stated previously, the proceedings before the CSRB began when Mr. Hughes filed his Appeal with the CSRB on June 22, 2004. Thereafter, on July 26, 2004, Mr. Hughes filed *Grievant's Motion for Summary Judgment* (Motion for Summary Judgment) with an accompanying memorandum of points and authority in support of this motion. (Memorandum in Support of Summary Judgment)

Mr. Hughes moved for summary judgment primarily on the basis that the Department's treatment of him was inconsistent with how the Department had treated "other similarly situated employees." (Memorandum in Support of Summary Judgment at 9) Citing to *Lunnen v. Utah Dep't of Transportation*, 886 P.2d 70 (Utah. Ct. App. 1995), Mr. Hughes argued that the Department's alleged inconsistent treatment of him violated due process mandates that career service employees are entitled to receive. (*Id.* at 9, 14) He further argued in support of his motion for summary judgment that "under no set of facts can DHS prove that termination of Grievant's [Mr. Hughes'] employment was not disproportionate." (*Id.* at 12) Again, in making this argument Mr. Hughes relies chiefly on the Utah Court of Appeals' decision in *Lunnen*. (*Id.*)

In its *Memorandum in Opposition to Grievant's Motion for Summary Judgment* (Opposition Memorandum), the Department argued that Mr. Hughes' Motion for Summary Judgment be denied because "several material facts" were in dispute. (Opposition Memorandum at 9) Alternatively, the Department argued that summary judgment be denied because there existed a "fair, rational basis explaining the Department's treatment of Mr. Hughes." (*Id.* at 12-13) Specifically, the Department

argued that any inconsistency in its treatment of Mr. Hughes was because the Department simply misunderstood the Hatch Act and its obligations thereunder prior to Mr. Hughes' candidacy for a seat in the Utah House of Representatives. (*Id.*)

On July 28, 2004, shortly after Mr. Hughes filed his Motion for Summary Judgment and accompanying memorandum in support thereof, DHRM filed a *Motion to Dismiss the Department of Human Resource Management* (Motion to Dismiss) as a respondent in this case. This Motion to Dismiss was accompanied by a *Memorandum in Support of Motion to Dismiss the Department of Human Resource Management* (Memorandum in Support of Motion to Dismiss).

In moving to dismiss DHRM as a respondent in this matter, DHRM argued that they were not a proper party because Mr. Hughes never processed a grievance against DHRM at the Department level as required by statute nor grieved to DHRM the issues now being raised on appeal of Mr. Hughes' dismissal. (Memorandum in Support of Motion to Dismiss at 3) DHRM argued that because Mr. Hughes failed to meet these statutory requirements, his grievance against DHRM was invalid and must be dismissed. DHRM further argued it was not a necessary party in this matter because the CSRB lacked jurisdiction to review or decide matters relating to rules promulgated by DHRM. (*Id.*)

In *Brent N. Hughes' Memorandum in Opposition to Motion to Dismiss Filed by the Department of Human Resource Management* (Opposition to Motion to Dismiss), Mr. Hughes argued that DHRM's "motion wholly ignores the Career Service Review Board's rule governing appeals

involving discipline" versus appeals involving employee grievances. (Opposition to Motion to Dismiss at 2-3) Relying upon this distinction, Mr. Hughes argued that he properly included DHRM as a respondent in this matter, and that failure to include DHRM as a party would allow the Department and DHRM to jointly escape liability by simply "pointing a finger" at the other party. (*Id.* at 4-5)

On September 21, 2004, the Hearing Officer entered an order ruling on Mr. Hughes' Motion for Summary Judgment and DHRM's Motion to Dismiss.[5] In this order the Hearing Officer denied Mr. Hughes' Motion for Summary Judgment, but granted DHRM's Motion to Dismiss it as a party in this matter.

In reaching his decision denying Mr. Hughes' motion for summary judgment, the Hearing Officer agreed with the Department that there were "just too many facts and questions as to permit a granting of a motion of summary judgment." (Decision on Motion for Summary Judgment ¶ 2 at 5) In his decision, the Hearing Officer specifically determined: "[T]here is a myriad of facts in dispute between the parties. Even as to those facts on their face arguably agreed to by the parties there is extensive disagreement as to just what such agreed to facts mean." (*Id.*) In denying Mr. Hughes' Motion for Summary Judgment, the Hearing Officer then concluded: "The only fair,

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[5] This order also ruled on numerous other motions filed by the parties during the initial stages of this appeal. The Hearing Officer captioned this order as *Order on Grievant's Motions For/To: Summary Judgment, Strike Certain Paragraphs of Affidavits of Emma Chacon and Robin Arnold-Williams and Corresponding Paragraphs in Agency's Memorandum and Motion for Discovery Order* (Decision on Motion for Summary Judgment; Decision on Motion to Dismiss).

reasonable and effective means as to determining what or what did not take place in regards to the Grievant's termination and dismissal is a full formal evidentiary hearing. The best interests of both of the parties as well as in the 'interest of justice' require such." (*Id.*)

In granting DHRM's Motion to Dismiss, the Hearing Officer specifically found that "DHRM is not a necessary and/or essential party as to the implementing or ordering the remedies prayed for by Grievant as regards reinstatement." (Decision on Motion to Dismiss ¶ 2.a. at 2-3) In reaching his decision, the Hearing Officer concluded: "The jurisdiction and powers of the CSRB clearly encompass the remedies prayed for as regards the Utah Department of Human Services, but not as regards DHRM. The remedies prayed for as regards reinstatement, full backpay and benefits – if proven by the Grievant as warranted – may only be applied to the Utah Department of Human Services by order of the CSRB." (*Id.*)[6]

On September 28 and 29, 2004, an evidentiary hearing was held before CSRB Hearing Officer Mark E. Kleinfield. At this hearing, the Department was represented by Assistant Utah Attorney General J. Francis Valerga. Mr. Valerga was assisted by Emma Chacon, Director, ORS. Mr. Hughes was represented by Phillip W. Dyer and Carey A. Seager, Attorneys at Law.

The statute authorizing the CSRB to hold an evidentiary hearing can be found at *Utah Code Ann.* § 67-19a-406. Moreover, because Mr. Hughes was terminated from employment, the Department had the burden of proving

[6] The correctness of the Hearing Officer's decision to dismiss DHRM is not before the Board on this appeal.

its case by substantial evidence and the burden of going forward. (*Utah Code Ann.* § 67-19a-406(2)(a) and (c))

The specific issues adjudicated at the Step 5/evidentiary hearing were twofold. First, did the Department terminate Mr. Hughes' employment for just cause or for the good of the public service as required by *Utah Code Ann.* § 67-19-18(1)? Second, if substantial evidence does not support the Department's decision to terminate Mr. Hughes' employment, what is the appropriate remedy? (Prehearing Conference Summary and Order ¶ 3 at 2; Step 5 Decision ¶ 2 at 4)

At the evidentiary hearing on this matter, the Hearing Officer received evidence relating to the specific allegations against Mr. Hughes. This evidence included testimony given and documents received concerning Mr. Hughes' actions in alleged violation of the Federal Hatch Act and the Department's conflict of interest policy.

Specifically, testimony was given and documentary evidence was received establishing that Mr. Hughes became a candidate for a seat in the Utah House of Representatives while an employee with the Department. Mr. Hughes' candidacy was discovered by Ms. Chacon, who was perusing the published list of candidates in an effort to evaluate their potential impact on the Department. (September 28, 2004 Transcript (Tr.I) at 21-22) Testimony was also given and documents received concerning the Department's treatment of present and former Department employees of the Department who either held or were candidates for elective office. The evidentiary hearing also included extensive evidence concerning the Department's internal policies regarding the Federal Hatch Act.

At the close of the Department's case in chief, Mr. Hughes' attorney, Phillip W. Dyer, moved for a directed verdict essentially arguing that the Department had failed to carry its burden, both factually and legally, thus requiring Mr. Hughes' reinstatement. (Tr.II at 120-133; *Grievant's Brief in Reply to Agency Step 6 Appeal Brief* (Mr. Hughes' Appeal Brief) at 6 n.10) Counsel for the Department objected to Mr. Hughes' directed verdict and the Hearing Officer thereafter denied Mr. Hughes' "motion for directed verdict or motion for dismissal." (Tr.II at 152)

At the conclusion of the evidentiary hearing, the Hearing Officer requested that the parties submit post-hearing briefs on the issue of preemption regarding the Federal Hatch Act and Utah state law. After these post-hearing briefs were submitted, the Hearing Officer entered his *Findings of Fact, Conclusions of Law Decision and Order* dated November 2, 2004.

In his Step 5 Decision, the Hearing Officer outlined the evidence presented at the hearing and his extensive review of the parties' legal arguments regarding preemption and concluded that the Department had not met its burden to show that it complied with relevant statutory and administrative requirements. Based upon this finding, the Hearing Officer then ordered that the Department's June 18, 2004 Step 4 Decision be rescinded. (Step5 Decision at 8) In reaching his Step 5 decision, the Hearing Officer specifically found that "Only the United States Office of Special Counsel can enforce or prosecute the Hatch Act" and that "[o]nly the United States Merit Systems Protection Board can make a determination that a party . . . violated the Hatch Act." (*Id.* ¶¶ 3, 4 at 7)

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. ISSUES ON APPEAL

In its appeal before the Board, the Department primarily challenges the Hearing Officer's legal conclusions that only the United States Merit System Protection Board (MSPB) can make a determination that a party has violated the Federal Hatch Act or that only the United States Office of Special Council (OSC) can enforce or prosecute violations of the Federal Hatch Act. Specifically, the Department argues that there is no legal authority supporting the Hearing Officer's legal conclusion that only MSPB can determine whether an employee has violated the Hatch Act and that in fact numerous courts have held that state and local agencies can dismiss employees for violating the Hatch Act without waiting for MSPB to make such a determination. (Department Brief on Appeal at 9, 13)

The Department further challenges the Hearing Officer's failure to find that Mr. Hughes' candidacy for partisan public office violated the Department's conflict of interest policies. Addressing this argument in its brief, the Department points to the Hearing Officer's Step 5 Decision noting that while the Hearing Officer correctly found the facts as alleged by the Agency to be true, he erred in concluding that a prerequisite finding by MSPB of a Federal Hatch Act violation was required before the Department could terminate Mr. Hughes' employment for violating the Department's conflict of interest policy. (*Id.* at 17, 18)

In essence, the Department argues that the Hearing Officer erred by legally concluding that only MSPB can make a determination that Mr. Hughes had violated the

Hatch Act. It further argued that the Hearing Officer erred in concluding that the Department did not have the authority to determine Mr. Hughes violated conflict of interest policies when those policies were based solely on a prerequisite MSPB finding of a Federal Hatch Act violation. These issues will now be addressed in the remainder of this decision and final agency action.

II. THE BOARD'S APPELLATE STANDARDS OF REVIEW

We review Appellant's appeal under *Utah Administrative Code*, R137-1-22(4)(a) through (c), which reads as follows:

> (a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.
>
> (b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes in accordance with the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.

> (c) Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

Based upon the foregoing, the Board must first determine whether the Hearing Officer's factual findings are reasonable and rational based upon the evidentiary record as a whole and whether those findings are supported by substantial evidence. Next, our task is to review the fact finder's decision to determine whether the Hearing Officer correctly applied "the relevant policies, rules, and statutes according to the correctness standard," giving no deference to the Hearing Officer on this legal issue. Finally, the Board's appellate role is to consider whether the totality of the Department's disciplinary penalty of termination of Mr. Hughes's employment is reasonable and rational based upon our determination of the ultimate facts together with the correct application of relevant State policies, rules and statutes which were considered by our Hearing Officer.

BOARD'S REVIEW AND ANALYSIS OF FACTS AND ISSUES ON APPEAL

I. LEGAL ISSUES REGARDING THE DEPARTMENT'S FINDING THAT MR. HUGHES VIOLATED THE FEDERAL HATCH ACT

After reviewing the evidentiary record in this matter including not only the witnesses' testimony, but the numerous documents received into evidence, it appears to the Board that there is little factual dispute between the

Department and Mr. Hughes regarding the critical facts relied upon by the Department in making its decision to terminate Mr. Hughes' employment.[7] Indeed, in their briefs on appeal to this Board, neither party challenges the Hearing Officer's material findings of fact.

In the instant case, substantial evidence establishes that on March 17, 2004, Mr. Hughes became a candidate for a seat in the Utah House of Representatives, District 20. (Step 5 Decision ¶ 8.a.at 3; Department Brief on Appeal at 2; Tr.II at 172; Tr.I at 21-23) At the time Mr. Hughes filed his candidacy for a seat in the Utah House of Representatives, he was employed by the Department as a Collections/Compliance Supervisor for ORS. (Step 5 Decision ¶ 7.a at 2; Tr.I at 21; Tr.II at 170, 173; Agency Exs. 11, 14) This position was funded in large measure by monies received from the federal government. (Step 5 Decision ¶ 7.b at 2; Tr.I at 40, 46-47, 90, 103, 115; Agency Exs. 2, 3, 4, 10) The evidence establishes that the Department became aware of Mr. Hughes' candidacy on March 17, 2004. (Step 5 Decision ¶¶ 9-10 at 3; Tr.I at 21-26, Tr.II at 193; Agency Ex. 1)

The evidence further establishes that at the time Mr. Hughes became a candidate for a seat in the Utah House of Representatives, the Federal Hatch Act was in effect.[8]

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[7] In reaching this conclusion, the Board notes its agreement with the Department wherein the Department states in its brief: "There is little or no disagreement as to the facts in this case. Indeed, the hearing officer was correct in stating, 'both grievant and the agency . . . would appear to concur in large measure as to the basic chronology and core facts' ". (Department Brief on Appeal at 2)

[8] As stated previously, the Federal Hatch Act is codified at 5 U.S.C.A. § 1501 *et seq.*

This act effectively prohibits a "state or local officer or employee" (as that term is defined by statute) from being a candidate for a partisan elective office. 5 U.S.C.A. § 1502 At the time of Mr. Hughes' candidacy, the Department had an internal conflict of interest policy that provided that:

> 6. Hatch Act: During work time or during off time, when an employee's principal activity is directly related to a federally-financed program (even if their salary is not paid by the federal program), employees may not: 1) use their position and authority to influence or affect the outcome of an election or nomination; 2) coerce other employees to make contributions for political purposes; or; 3) be a candidate for a political office. (See: Hatch Act and Attorney General's Opinion No. 92-18 dated July 27, 1995)

(Step 5 Decision ¶¶ 4-5 at 2; Department Brief on Appeal at 2-3; Agency Ex. 19)

Based upon these factors, Mr. Hughes received a letter dated May 7, 2004, from Ms. Chacon advising him that his candidacy for a seat in the Utah House of Representatives violated the Federal Hatch Act.[9] (Step 5 Decision ¶ 12 at 3; Department Brief on Appeal at 3; Tr.I at 84-85; Agency Ex. 5) This letter specifically required that Mr. Hughes either withdraw his candidacy for a seat in the Utah House of Representatives or terminate his employment with ORS. (Agency Ex. 5) It further required Mr. Hughes to inform

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[9] Importantly, this letter made no reference to the Department's conflict of interest policy or to the Department's belief that Mr. Hughes' candidacy violated that policy. Indeed, Ms. Chacon specificially [sic] testified at the evidentiary hearing that at the time she wrote this letter she was "not familiar with what was in the conflict of interest policy." (Tr.I at 86-87)

the Department of his decision by May 14, 2004. (Agency Ex. 5)[10]

On May 13, 2004, the Department extended a third option to Mr. Hughes essentially allowing him to go on leave without pay pending the outcome of his election. (Step 5 Decision at ¶ 13 at 3; Tr.I at 42,162; Agency Ex. 6) On May 14, 2004, Mr. Hughes sought clarification from the Department regarding what the Department would do if he declined to accept any of the options given to him by the Department. (Step 5 Decision at ¶ 14 at 3; Agency Ex. 7) On May 18, 2004, the Department responded to Mr. Hughes' inquiry by advising Mr. Hughes that his employment with the Department would be terminated if he did not choose one of the options given him by the Department. (Step 5 Decision ¶ 15 at 3; Agency Ex. 8)

Mr. Hughes never selected from any of the options provided him by the Department. As a result of these events, Mr. Hughes' employment with the Department was terminated on June 18, 2004, for violating "5 U.S.C.A. § 1502, the Federal Hatch Act . . . DHS conflict of interest rules" and for "failure to advance the good of the public interest." (Agency Ex. 14)

At the conclusion of the Step 5 evidentiary hearing in this matter, the Hearing Officer issued his Step 5 Decision. In his decision, the Hearing Officer correctly found that

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[10] The Board notes that while this letter is dated May 7, 2004, Ms. Chacon testified that this letter actually was not prepared until May 12, 2004. (Tr.I at 84-85) Mr. Hughes testified that he did not receive this letter until May 13, 2004. (Tr.II at 173) To the extent the Hearing Officer's decision can be read to find that Ms. Chacon issued this letter on May 7, 2004, the Board is modifying that decision pursuant to CSRB rule R137-1-22(4)(b) and (8)(c).

"both Grievant and the Agency . . . concur in large measure as to the basic chronology and core facts." (Step 5 Decision ¶ 1 at 6) The Hearing Officer also agreed that as a State employee, Mr. Hughes was subject to the Federal Hatch Act and that a proven violation of that act would be sufficient to terminate Mr. Hughes' employment. (*Id.* at ¶ 5.a. at 5)

Despite these findings, however, the Hearing Officer nonetheless overturned the Department's decision to terminate Mr. Hughes' employment concluding that the Department had not met its burden to show that it "complied with all relevant statutory and administrative requirements" prior to terminating Mr. Hughes employment. (*Id.* at 8)[11] In reaching his decision, the Hearing Officer specifically ruled that jurisdictionally "only the United States' Merit System Protection Board can make a determination that a party . . . violated the Hatch Act" and that the Department erred in terminating Mr. Hughes' employment before such a determination was made by MSPB. (*Id.* at ¶¶ 4, 6 at 7-8)

On appeal to this Board, the Department asserts that the Hearing Officer erred in concluding that "only the United States' Merit System Protection Board (the MSPB) has the authority to determine a violation of the Hatch Act." (Appellant's Brief at 2) The Department also asserts that the Hearing Officer erred in concluding that a prerequisite determination by MSPB that a violation occurred was required before the Department could terminate Mr.

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[11] CSRB rule 137-1-21(3)(a)(ii) affirmatively requires that when reaching a decision, the evidentiary hearing officer determine "if the agency correctly applied relevant policies, rules, and statutes."

Hughes' employment for violating the Department's conflict of interest policy. (*Id.* at 15)

After thorough review of the evidentiary record and close examination of the Federal Hatch Act, the Board sustains the Hearing Officer's Step 5 Decision in this matter. In reaching this decision, the Board specifically finds that the hearing Officer was correct in concluding that a prerequisite determination by MSPB that Mr. Hughes had violated the Federal Hatch Act was required before the Department could terminate Mr. Hughes' employment for conduct in violation of that statute. Addressing this issue in his Step 5 Decision, the Hearing Officer specifically found that:

> (6) Notwithstanding that 100 or 1,000 individuals would present that the Grievant "violated" the Hatch Act, the only entities with THE "***ears***" to hear and THE "***eyes***" to see and determine such alleged violation are the United States Office of Special Counsel in prosecuting a charge before the United States Merit Systems Protection Board and such Board determining a violation.
>
> (7) Once found and determined, the Agency or any impacted entity could utilize such finding in implementing or enforcing its authority. In sum and substance, the Agency did not have the step 1 prerequisite of a "conviction" before it jumped to steps 2, 3, etc.

(Step 5 Decision ¶¶ 6.b.(ii)(6), (7) at 8)

After careful review of the Hearing Officer's legal conclusions, the Board finds the plain language of the Federal Hatch Act supports the Hearing Officer's decision. The Federal Hatch Act essentially delimits the scope of

permissible political activities by state employees whose principal employment is in connection with an activity financed in whole or in part by loans or grants made by the United States Government. 5 U.S.C.A. § 1501(4) State employees subject to these conditions may not be candidates for partisan elective office. 5 U.S.C.A. §§ 1502 and 1503

Regarding oversight and enforcement of these statutory provisions, the Federal Hatch Act provides as follows:

> 1504. Investigations; notice of hearing
>
> When a Federal agency charged with the duty of making a loan or grant of funds of the United States for use in an activity by a State or local officer or employee has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board, which shall –
>
> (1) fix a time and place for a hearing;
>
> * * *
>
> After this hearing, the Merit Systems Protection Board shall –
>
> (1) determine whether a violation of section 1502 of this title has occurred;
>
> (2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and

> (3) notify the officer or employee and the agency of the determination by registered or certified mail.

5 U.S.C.A. §§ 1504 and 1505

The undisputed facts of this case establish that none of these prerequisite events occurred prior to the Department's termination of Mr. Hughes' employment. Specifically, there is no evidence that any Federal agency charged "with the duty of making a loan or grant of funds of the United States" every reported Mr. Hughes' candidacy to OSC as required by 5 U.S.C.A. 1504. Moreover, the Department acknowledged that it was not aware of any formal investigation being conducted by OSC or that OSC had presented any findings to MSPB for a final determination. (Tr.I at 198) Finally, at the evidentiary hearing, the Department acknowledged MSPB has never made a determination that Mr. Hughes' candidacy for a seat in the Utah House of Representatives in fact violated section 1502 of the Federal Hatch Act. (*Id.*)

On appeal to this Board, the Department does not challenge these facts, but essentially argues that nothing in the Federal Hatch Act mandates or suggests that the Department on its own initiative could not dismiss Mr. Hughes for conduct which it concluded violated the Federal Hatch Act or the Department's policies related thereto. (Department Brief on Appeal at 12, citing *Stanback v. Chester Redevelopment Authority*, 1995 WL 621730 (E.D. Pa)) The Board is simply not persuaded by this argument.

In making this determination, the Board relies largely on the language of the statute itself. The Board agrees with Mr. Hughes that the Federal Hatch Act creates a

scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (Mr. Hughes' Brief on Appeal at 13, citing to *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996)) In fact, it exclusively charges federal agencies with a duty to report suspected Federal Hatch Act violations to OSC. 5 U.S.C.A. 1504 Once a report has been made, OSC exclusively must do an investigation and report its findings to MSPB. (*Id.*) If OSC concludes that a violation has occurred, it must file charges with MSPB. (*Id.*)

Upon receipt of any charges from OSC, MSPB is statutorily required to afford a state and/or its employee an evidentiary hearing. 5 U.S.C.A. 1505 Pursuant to its rulemaking authority, MSPB has determined that it has jurisdiction over complaints regarding violations of the Federal Hatch Act and has further required that the standard of proof in Federal Hatch Act cases be a preponderance of evidence standard. (Mr. Hughes' Brief on Appeal at 21)[12]

After MSPB has made a determination regarding a violation of the Federal Hatch Act, either the state/or its employee may seek judicial review of MSPB's decision in the United States District Court. 5 U.S.C.A. 1508 A party

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[12] The Board notes that this standard of proof differs significantly from the substantial evidence standard the Department is required to prove before the CSRB. Specifically, *Utah Code Ann.* § 67-19a-406(2)(c) provides that: "the party with the burden of proof must prove their case by substantial evidence." Moreover, § 67-19a-406(2)(a) provides that "the agency has the burden of proof in all grievances resulting from dismissals. . . . " Mr. Hughes' was dismissed from his employment with the Department for alleged violations of the Federal Hatch Act. Adjudicating the case before the CSRB thus alters that standard of proof required to make a Federal Hatch Act violation determination.

dissatisfied with the decision of the United States District Court may then appeal that decision through the federal appellate process up to and including certiorari with the United States Supreme Court. (*Id.*)

In light of these factors, the Board agrees with Mr. Hughes that the Federal Hatch Act creates a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplant it." (*See generally* Mr. Hughes' Brief on Appeal at 13, citing *Barnett Bank v. Nelson*, *supra*) Moreover, the Department's own witness testified that the Federal Hatch Act was a "difficult and complex piece of litigation not generally understood by the executive directors of the State's numerous departments and agencies." (Tr.I at 129-130)

In light of the "difficult and complex" nature of the Federal Hatch Act and the fact that the executive director of DHS did not understand this act, the Board believes it would be irresponsible to allow DHS in this case and State departments and agencies in a broader sense to make independent and potentially inconsistent determinations regarding Federal Hatch Act statutes which this Board believes Congress left no room for state agencies to decide.[13] These concerns are magnified considering that OSC

[13] The very real danger of inconsistent departmental determinations regarding violations of the Federal Hatch Act are amply exemplified by DHS's own inconsistent treatment of individuals running for or holding partisan elective office in potential violation of the Federal Hatch Act. The evidentiary record undisputedly establishes that Mr. Hughes was treated differently from four other individuals who were either candidates for, or actually elected to, partisan political office while employees of the Department. Three of these individuals were never asked to resign after declaring their candidacy for partisan

(Continued on following page)

has an established, effective and thorough process in which the Department could have obtained an advisory opinion regarding Mr. Hughes' candidacy. (Department Ex. 17; Grievant Exs. 2-8)

The opportunity to obtain an advisory opinion from OSC is especially illuminative in this case. The undisputed facts of this case establish that the Department became aware of Mr. Hughes' candidacy on March 17, 2004. (Tr.I at 21-25; Agency Ex. 1) At that time, there was a great deal of general uncertainty within the Department regarding the Federal Hatch Act. (Tr.I at 26, 32-33, 36-41; Agency Exs. 1-4) Specifically, the Department was unsure whether Mr. Hughes' candidacy even violated the act or what the Department's obligations were with respect to enforcing the Federal Hatch Act provisions. (*Id.*) This uncertainty remained until early May after the Department received an advisory opinion from the Utah Department of Human Resource Management (DHRM) advising the Department of DHRM's belief that Mr. Hughes' position was subject to

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elective office. (Department Memorandum in Opposition to Summary Judgment at 10-12) One of these individuals was asked to resign only after he won election to the Utah State Senate in 1996. (*Id.*) Another individual was not asked to resign by the Department even after winning election to the Utah State House of Representatives because the Department did not believe this individual's position was funded by federal funds.

Ostensibly because Mr. Hughes prevailed in the evidentiary hearing in this matter, the issue of due process consistency is not an issue before the Board at this time; however, the Board notes its deep concern regarding the Department's inconsistent treatment of Mr. Hughes in this case. It believes that the problems exemplified by the Department's admitted inconsistent treatment of employees in connection with the Federal Hatch Act are remedied by allowing the federal agencies entrusted with oversight and enforcement to make violation determinations.

the Federal Hatch Act and that his candidacy triggered obligations under that act. (Agency Exs. 3-4)

Based upon these factors, in early May, the Department informed Mr. Hughes that his candidacy violated provisions of the Federal Hatch Act and as a result, he must either withdraw his candidacy for partisan elective office, terminate his employment with ORS, or request to be put on a leave without pay status pending the outcome of his candidacy. (Agency Exs. 4-5) Mr. Hughes did not choose any of the options provided to him by the Department and was given his Notice of Intent to dismiss him from employment on June 1, 2004, more than six weeks after the Department became aware of his candidacy. (Agency Ex. 11)

Based upon these facts, it is clear there was time to obtain an advisory opinion before terminating Mr. Hughes' employment. The Board finds the Department erred in not obtaining an advisory opinion from OSC before terminating Mr. Hughes' employment. In making this determination, the Board reemphasizes its finding that by statute it is OSC and MSPB that are charged with making final determinations that a Federal Hatch Act violation has occurred. By statutory and regulatory design, these agencies have acquired the specialized expertise and experience to properly and consistently adjudicate and decide alleged Federal Hatch Act violations.

Moreover, it is clear that in the instant case, there would have been no harm to the Department had it gone through the simple process of obtaining an advisory opinion from OSC before terminating Mr. Hughes' employment. The Board acknowledges that a violation of the Federal Hatch Act may sometimes appear to be obvious

and within the capacity of state agencies. Such will not always be the case, however, and the Federal Hatch Act places that determination in the hands of federal agencies with experience and expertise in the field.

Further, permitting state agencies to assume the federal role in these decisions would leave open the potential for inappropriate determinations. The Board has no reason to question the Department's assertion that any inconsistency in its treatment of Mr. Hughes, as compared with previous employee-candidates, was merely because the Department misunderstood the Federal Hatch Act and its obligations thereunder; however, the Board believes the structure of the Federal Hatch Act itself is intended to reduce the likelihood that such decisions would be made on the basis of political party affiliation, perceived sympathy or antipathy to the agency's agenda or budget needs, or other inappropriate factors that are less likely to affect the determination at the federal level.

Based upon the foregoing, the Board upholds the Hearing Officer's decision. In reaching this decision, the Board finds that the statutory scheme of the Federal Hatch Act delimits enforcement of the Act to OSC and that only MSPB can make final determinations regarding alleged Federal Hatch Act violations. The Board simply finds that the Department exceeded its authority in determining that Mr. Hughes violated the Federal Hatch Act.

II. The Department's Conflict of Interest Policy

During these proceedings, the Department has argued that Mr. Hughes' conduct violated provisions of its conflict

of interest policy regarding candidacy for a "political office." (Agency Ex. 11) In its entirety, this policy states:

> 6. Hatch Act: During work time or during off time, when an employee's principal activity is directly related to a federally-financed program (even if their salary is not paid by the federal program), employees may not: 1) use their position and authority to influence or affect the outcome of an election or nomination; 2) coerce other employees to make contributions for political purposes; or; 3) be a candidate for a political office. (See: Hatch Act and Attorney General's Opinion No. 92-18 dated July 27, 1995)

(Agency Ex. 19)

The Department essentially argues that it is entitled to terminate Mr. Hughes' employment for violating its conflict of interest policy which prohibits an employee whose principle employment activity is directly related to a federally funded program to "be a candidate for political office." The policy then cites specifically to the Federal Hatch Act itself and to Attorney General's Opinion 92-18 dated July 27, 1995, regarding the "applicability of the Hatch Act to certain State employees. . . . " (See Agency Exs. 18, 19; 5 U.S.C.A. § 1502(a))

Review of that portion of the Department's conflict of interest policy at issue at this case establishes that a violation of this policy is premised on a violation of the Federal Hatch Act. Indeed, regarding the Department's conflict of interest policy, Exec. Dir. Arnold-Williams specifically testified on cross examination as follows:

> Q. Okay. If there had been no violation – alleged violation of the Hatch Act, in your mind would there have been any basis for discipline?
>
> Q [sic]. No.

(Tr.I at 218)

Conversely, to the extent the Department argues its conflict of interest policy is not based upon a Federal Hatch Act violation, it improperly prohibits a career service employee's right to run for public office. *Utah Code Ann.* § 67-19-19 specifically encourages political activity by career service employees unless the employee is prohibited from doing so by the Federal Hatch Act. Based upon these factors, any policy purportedly creating greater restrictions on a career service employee's right to become "a candidate for political office" would be invalid.

Based upon the foregoing, the Board sustains the Hearing Officer's decision overturning the Department's dismissal of Mr. Hughes. A prerequisite to finding Mr. Hughes violated Department policy requires a determination that Mr. Hughes violated the Federal Hatch Act. As stated previously, such determinations are the exclusive province of MSPB.

Moreover, the Board does not believe the Department's conflict of interest policy contemplates a right to dismiss a career service employee for political activity unless such activity violates the Federal Hatch Act. This is clear not only from the testimony of Exec. Dir. Arnold-Williams, but from a plain reading of the conflict of interest policy itself. Finally, to the extent the Department argues that its conflict of interest policy provides a right to dismiss a career service employee for political activity not

proscribed by the Federal Hatch Act the rule is contrary to State law and thus, invalid.

DECISION

The Board has addressed the issues raised by the Department in their appeal. After thoroughly reviewing the evidentiary record and carefully studying the legal issues raised by the parties before this Board, the Board sustains the Hearing Officer's decision for the reasons set forth herein and hereby denies the Department's appeal to this Board. The Department's Order of Termination effective June 18, 2004, is hereby rescinded. The Board orders Mr. Hughes returned to his former position with back pay for the period of time from the effective date of the termination of his employment to the date of reinstatement with full restoration of benefits to which he would have been entitled during this time period.

DATED this 17th day of June 2005.

/s/ Blake S. Atkin
Blake S. Atkin, Chair

/s/ Kevin C. Timken
Kevin C. Timken, Member

DISSENTING OPINION

After carefully considering the legal arguments presented by the parties in their respective briefs, I dissent from the majority's opinion in this matter. This dissent is based primarily upon my examination of the Federal Hatch Act which I find reveals no explicit language of congressional intent to preempt state law. Specifically, I disagree that the Federal Hatch Act creates a

federal scheme of regulation so pervasive as to make reasonable an inference that Congress left no room for States to supplement it. I believe this is clear from the very wording of the statute which makes compliance with the act voluntary.

Moreover, I agree with the Department that the purpose of the Federal Hatch Act is to grant MSPB sole jurisdiction to make determinations as to whether a state employee's alleged violation of the Federal Hatch Act requires an appropriate federal agency to withhold grants or loans to the state. (Department Brief on Appeal at 14) However, this exclusive jurisdiction does not extend to determinations as to whether an employee has violated the Federal Hatch Act for purposes of determining if the employee violated a departmental policy. In this respect, I believe the Department is the party to make such a determination.

In this case, the facts are largely undisputed. Mr. Hughes was a candidate for a partisan political office while employed by the State to perform duties directly related to activities funded in whole or in part with federal funds. These actions not only violated provisions of the Federal Hatch Act, but more important, the Department's own conflict of interest policy. I do not believe that a formal determination by MSPB was required before the Department ruled that its conflict of interest policies were violated.

Based upon these factors, I would overturn the Hearing Officer's decision and sustain the Department's Final Decision terminating Mr. Hughes' employment effective June 18, 2004.

/s/ Joan M. Gallegos
Joan M. Gallegos, Member

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with *Utah Administrative Code*, R137-1-22(10), and *Utah Code* §63-46b-13, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to *Utah Administrative Code*, R137-1-11, and *Utah Code*, §63-46b-14 and -16, Utah Administrative Procedures Act.

BEFORE THE STATE OF UTAH
CAREER SERVICE REVIEW BOARD

BRENT N. HUGHES, **Grievant,** **v.** **UTAH DEPARTMENT OF HUMAN SERVICES,** **Agency.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER** **Case No. 24 CSRB/H.O. 354** **Hearing Officer: Mark E. Kleinfield**

THE STEP 5 HEARING in the above-entitled case was held on September 28-29, 2004, at the State Office Building, Room 1112, on Capitol Hill, Salt Lake City, Utah, before Mark E. Kleinfield, Career Service Review Board (CSRB or Board) Hearing Officer. Mr. Brent N. Hughes (Grievant) was present and represented by his counsel, Phillip W. Dyer and Carey A. Seager, Attorneys at Law. The Utah Department of Human Services (Department or Agency or DHS) was represented by Assistant Attorney General J. Francis Valerga.[1] The Management Representative was Emma Chacon, Department Human Services, Office of Recovery Services Director. Certified court reporters, Garcia & Love (September 28, 2004) and Thacker + Co., LLC (September 29, 2004), both of Salt Lake City, Utah made a verbatim record of the proceedings. Witnesses

[1] This case was originally filed with the Department of Human Resource Management as a "co-agency". After oral argument based on the Hearing Officer's September 21, 2004 Order on . . . Agency's Motions(s) to Dismiss Utah Department of Human Resource Management (DHRM), the Utah DHRM was dismissed as a party.

(12 for the Department[2] and 1 for the Grievant[3]) were placed under oath, and testimony and documentary evidence[4] (30 exhibits for the Department and 34 exhibits for the Grievant) were received into the record. The Grievant filed a prehearing brief. The Hearing Officer requested the filing of posthearing briefs as regards "preemption" with the Grievant's brief due by the close of business, 5:00 p.m., October 8, 2004 and the Agency's brief due by the close of business, 5:00 p.m., October 29, 2004, with both parties having filed briefs.

HAVING REVIEWED the documentary evidence, testimony, and prehearing and posthearing briefs, the Hearing Officer as Presiding Officer (*Utah Code Ann.* § 63-46b-2(1)(h)) now makes and enters his *Findings of Fact, Conclusions of Law, Decision and Order* as follows:

AUTHORITY

The authority for the Career Service Review Board (CSRB) to hold a Step 5 hearing is found at *Utah Code Ann.* § 67-19a-406 and *Utah Admin Code*, R137-1-21.

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[2] *Department witnesses* (in order): Emma Chacon, Jeff Herring, Robin Arnold-Williams, Robert Muhlestein, Mike O'Brien, Gena Villegas, Brent Johnson, Blake Chard, Fred Weidner, Ty McCartney, John Thompson and Glenn Barrow.

[3] *Grievant witnesses* (in order): Brent N. Hughes, Grievant.

[4] **SEE** "*Log of Exhibits*" and Grievant and Agency exhibit "books".

ISSUES

Did the Utah Department of Human Services correctly apply the State's administrative rules and statutory provisions when terminating Grievant's employment?

FINDINGS OF FACT

1. R477-11, Utah Department of Human Resource Management, Discipline, (Notice of Continuation June 11, 2002), was in effect during all material times herein.

2. R477-9, Utah Department of Human Resource Management, Employee Conduct, (Notice of Continuation June 11, 2002), was in effect during all material times herein.

3. Chapter 16 of Title 67, *Utah Code Ann.*, 1953, as amended, Ethics, was in effect during all material times herein.

4. Utah Department of Human Services Policy & Procedures, Conflict of Interest, Reference: 02-02, Effective Date: July 1, 1991, Revision Date: May 22, 2000, was in effect during all material times herein.

5. 5 United States Code 1501, et seq., commonly called the federal Hatch Act, was in effect during all material times herein.

6. Utah Attorney General's Opinion No. 92-18 dated July 27, 1995, was in effect during all material times herein.

7. a. Grievant was a career service employee holding the position of Collection/Compliance Supervisor,

Office of Recovery Services, Utah Department of Human Services.

b. Grievant's position was one which was part of a program financed in whole or in large part by loans or grants made by the United States or a federal agency.

c. Grievant had been employed by the State since October 1979.

d. Grievant's employment record apparently is (was) devoid of any substantial problems up to the present circumstances. (Ex. G-1)

8. a. On or about March 17, 2004 the Grievant filed to run for the Utah House of Representatives in District 20.

b. On March 17, 2004, Grievant notified his former supervisor, Gordon Hancock, of his filing.

9. On March 17, 2004, Emma Chacon, Director, Office of Recovery Services, Utah Department of Human Services, became aware of the Grievant's filing while searching the Utah State Election Office website.

10. a. On March 17, 2004, Ms. Chacon emailed Dr. Robin Arnold-Williams, Executive Director, Utah Department of Human Services, as regards Grievant's filing. (Ex.A-1)

b. On March 18, 2004, Dr. Arnold-Williams responded to Ms. Chacon via email. (Ex. A-1)

11. On April 20, 2004, Dr. Arnold-Williams emailed Brian Farr, Governor's legal counsel, regarding Grievant's

circumstances requesting Mr. Farr's review and advice. (Ex. A-2).[5] (SEE also Exs. A-3, A-4.)

12. On May 7, 2004, Ms. Chacon wrote a letter to Grievant presenting a violation of the federal Hatch Act and two options to the Grievant: 1) "either quit your partisan candidacy" or 2) "you must terminate your employment with ORS" with an inferred May 14, 2004 deadline. (Ex. A-5) This letter was sent via state mail and was received by Grievant on May 13, 2004.

13. On May 13, 2004, Ms. Chacon emailed Grievant regarding a third option which Ms. Chacon had been informed of by Dr. Arnold-Williams of "leave without pay" pending the results of the election. (Ex. A-6)

14. On May 14, 2004, Grievant emailed Ms. Chacon as to clarification of Ms. Chacon's earlier May 7, 2004 letter.

15. On May 18, 2004, Ms. Chacon sent a letter to Grievant responding to Grievant's May 14, 2004 clarification requests. In particular, in response to question: "6. Am I subject to termination if no option is exercised? Yes." Included in this letter Ms. Chacon stated: "Please respond by Friday, May 21, 2004, letting me know what you intend to do." (Ex. A-8)

16. On May 24, 2004, Grievant wrote a "Memorandum" to Ms. Chacon regarding: "Your Letters of May 7, 2004 and May 18, 2004" concluding with a "request that I (Grievant) be permitted to use my annual leave and

[5] Mr. Farr, an Assistant Attorney General on July 27, 1995, was the author of AG Opinion 92-18 regarding the federal Hatch Act.

converted sick leave until all of the alternatives have been examined and/or exhausted." (Ex. A-9)

17. Grievant did not select any of the options set forth in Ms. Chacon's May 7, 2004 letter and May 13, 2004 email to Grievant.

18. On June 1, 2004, Ms. Chacon sent a notice of Intent to Dismiss to the Grievant. (Ex. A-11)

19. Grievant timely invoked his appeal rights and requested a Step 4 appeal hearing with the Executive Director of the Department in a June 8, 2004 "Reply to Notice of Intent to Dismiss, Appeal and Request for Hearing" memo to Dr. Robin Arnold-Williams. (**SEE** Ex. A-12)

20. Grievant met with Executive Director Arnold-Williams on June 17, 2004.

21. Grievant was informed of the Department's "*determination to allow the decision to stand*" and his further appeal rights in a June 18, 2004 letter from Dr. Arnold-Williams (Ex. A-14)

22. Subsequent to the termination, Grievant filed a timely appeal to the Career Service Review Board on June 22, 2004, and ultimately was heard at this Step 5 hearing. (SEE Grievant's "Request for Agency Action and/or, Alternatively, Appeal to Career Service Review Board from Final Agency Decision.")

BASED ON THE ABOVE and foregoing Findings of Fact, the Presiding Officer enters the following:

CONCLUSIONS OF LAW

1. Pursuant to *Utah Code Ann.* § 67-19a-406(2)(a), the Agency has the burden of proof in all grievances resulting from dismissal.

2. The evidentiary standard by which the Agency must meet its burden of proof (persuasion) is substantial evidence. (*Utah Code Ann.* § 67-19a-406(2)(c))

3. Substantial evidence is defined as:

> a. [E]vidence possessing something of substance and relevant consequence, and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. It is evidence that a reasonable mind might accept as adequate to support a conclusion, but is less than a preponderance. *Utah Admin. Code* R137-1-2; and
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> b. [T]hat quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. *First National Bank v. County Board of Equalization*, 799 2d 1163, 1165 (Utah 1990)

4. R477-11-1(1) states:

> (1) Agency management may discipline any employee for any of the following causes or reasons:
>
> (a) noncompliance with these rules, agency or other applicable policies, including but not limited to safety policies, agency professional standards and workplace policies;
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> * * *

(e) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service;

5. a. A ***proven*** violation of the federal Hatch Act, 5 United States Code 1501, et seq. would equate in some sense or degree to:

(i)(a) noncompliance with these rules, agency or other applicable policies, including but not limited to safety policies, agency professional standards and work-place policies; (R477-11-1);

(ii)(e) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service; (R477-11-1);

(iii) noncompliance with R477-9, Utah Department of Human Resource Management, Employee Conduct;

(iv) noncompliance with Utah Department of Human Services Policy & Procedures, Conflict of Interest;

(v) violation of Chapter 16 of Title 67, Utah Code, 1953, as amended, Ethics; and

(vi) nonobservance of Utah Attorney General's Opinion No. 92-18 dated July 27, 1995;

all which were in effect during all material times herein.

b. ***Possible*** violations of the federal Hatch Act, 5 United States Code 1501 et seq. of which investigations may be "initiated" by complaint by any member of the public is *only* "***enforceable***" by the United States Office of Special Counsel. (Ex. A-17)

c. (i) The Grievant's ***alleged*** violation of the Hatch Act does *not* equate to a ***proven*** violation of the Hatch Act.

(ii) The Grievant's ***alleged*** violation of the Hatch Act does *not* equate to:

(1) a proven noncompliance with agency rules or applicable policies as referenced in R477-11-1(1)(a); or

(2) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service as referenced in R477-11-1(1)(e); or

(3) a proven violation of, noncompliance with or nonobservance of any other statute, regulation, policy or otherwise.

6. Grievant's actions do *not* equate to:

a. "cause" as referenced in R477-11-2; or

b. "adequate cause" as referenced in R477-11-2(d);

as would justify dismissal.

7. The Agency has *not* carried its burden of proof.

8. The Agency's letter of dismissal of June 18, 2004 should be rescinded.

DISCUSSION

1. Both Grievant and the Agency in large measure while advocating clearly different characterizations or interpretations and import of the above referenced facts in

substance would appear to concur in large measure as to the basic chronology and core facts.

2. As a career service employee at the time of his separation from State employment, Grievant held the position of Collection/Compliance Supervisor, Office of Recovery Services, Utah Department of Human Services.

3. Grievant had been a State employee for close to 25 years. Over the term of his employment, he has held progressively increasing responsible positions with the Utah Department of Human Services.

4. Grievant filed as a candidate for elected public office, a right that all qualified electors possess.

5. Grievant also though as a state employee was subject to the federal Hatch Act. In summary which a proven violation of such act could (would) subject the State (Agency) to extensive financial penalties.

6. a. The Agency has for want of a better phrase "placed all its eggs in one basket." The Agency has alleged and arguably in some sense "shown" that the Grievant has "committed" a "*Lee offense*" in that the Grievant has "allegedly, possibly (probably), conceivably, apparently, arguably, ad infinitumly" "violated" the Hatch Act. If the Agency has proven a violation of the Hatch Act then the Grievant has noncomplied, violated and or nonobserved the sundry statutes, regulations, policies and otherwise as cited herein.

b. (i) While the Grievant has presented a myriad of defenses and arguments concerning past actions of the Agency as regards previous Agency employees who were elected public office seekers and even public office holders and due process issues, such are not in this Hearing

Officer's mind very impressive or sustainable.[6] Such, in large measure, this Hearing Officer will dispense with without extensive analysis as he did at the hearing itself in overruling the Grievant's oral Motion for Directed Verdict at the conclusion of the Agency's case in chief.

(ii)(1) The prime stumbling block in blanketly sustaining the Agency is the Agency's "hanging its hat" on an "all or nothing" approach as regards the Hatch Act.

(2) The Agency basically said: "Grievant violated the Hatch Act and therefore he noncomplied, violated, etc. the referenced state statutes, regulations, etc." Such is well and good in theory. The Agency can (could) look to a ***proven*** on-the-record Hatch violation and overlay it as proof almost "res ipsa loquitur" of noncompliance, violation, etc. of the referenced State statutes, regulations and policies. Agencies in numerous proceedings against both licensees and its own employees tendering a certified copy of a court judgment to prove an allegation such as a criminal conviction without the necessity of further evidence.

(3) The Agency, however, also must look to the whole Hatch Act, including jurisdiction and enforcement authority. Only the United States Office of Special Counsel can enforce or prosecute the Hatch Act.

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[6] These past circumstances dealt with Robert Muhlestein, Ty McCartney, John Barrow [sic] [Thompson], and Glen Barrow amongst others over a number of years and agency administrations. The only real point made by both Grievant and the Agency which the Agency acknowledged is (was) that no one at the Agency knew what the Hatch was or how to interpret, and more importantly, how to "implement" it.

(4) Only the United States Merit Systems Protection Board can make a determination that a party (Grievant) "absolutely, definitely, specifically, etc." violated the Hatch Act. No matter how many Agency personnel– from the clerk at the front desk up to and including the Executive Director – say a party violated the Hatch Act, such does ***not*** make it so.

(5) On a theoretical basis, one can be said to violate numerous laws or even social prohibitions every day. Absent a "*court of competent jurisdiction*" determining, such any "violation" is theoretical and occurs in some sense in a "vacuum." The old philosophical question of: "If a tree falls in the forest and no one is around to **hear** it fall does it make a sound(?)" or the more "legal" type quandry of: "If you are at a stop light at 2:00 a.m. and you wait and wait and the light never changes from red to green and you go through it, and no police officer or anyone is around to **see** you, have you broken the law?"

(6) Notwithstanding that 100 or 1,000 individuals would present that the Grievant "violated" the Hatch Act, the only entities with THE "***ears***" to hear and THE "***eyes***" to see and determine such alleged violation are the United States Office of Special Counsel in prosecuting a charge before the United States Merit Systems Protection Board and such Board determining a violation.

(7) Once found and determined, the Agency or any impacted entity could utilize such finding in implementing or enforcing its authority. In sum and substance, the Agency did not have the step 1 prerequisite of a "conviction" before it jumped to steps 2, 3, etc.

7. Such having been said, it can be said that the Agency acted in good faith and not – within the Hearing

Officer's mind – with malice or with an agenda as alluded to by Grievant in his testimony and numerous filings. However, good faith though does not overcome jurisdiction and due process.

WHEREFORE, BASED UPON the above and foregoing Conclusions of Law and Discussion, this Hearing Officer enters the following:

DECISION

The Utah Department of Human Services has ***not*** met its burden to show that the Agency complied with all relevant statutory and administrative requirements as to showing "adequate cause" when terminating Grievant's employment.

ORDER

The termination of Grievant's employment with the Utah Department of Human Services as of June 18, 2004, as ordered in the Agency's June 18, 2004 "Final Decision – Dismissal" letter is hereby rescinded.

DATED this 2nd day of November 2004.

/s/ Mark E. Kleinfield
CSRB Hearing Officer

RECONSIDERATION

Any request for reconsideration must be filed with the Career Service Review Board within ten working days upon receipt of this decision. *Utah Admin. Code* R137-1-21(12)(b).

APPEAL

Any appeal of this formal adjudicative decision must be filed with the Career Service Review Board within ten working days upon receipt of this decision according to *Utah Code Ann.* § 67-19a-407(1)(a)(i).

[SEAL]
State of Utah
Department of Human Services

OLENE S. WALKER
Governor

GAYLE F. McKEACHNIE
Lieutenant Governor

ROBIN ARNOLD-WILLIAMS
Executive Director

MARK E. WARD
Deputy Director

MARIE CHRISTMAN
Deputy Director

June 18, 2004

BRENT HUGHES
39 SOUTH 350 EAST
NORTH SALT LAKE, UT 84054

Re: Final Decision – Dismissal

Dear Mr. Hughes:

After you appeared before me at a hearing on June 17, 2004, based on the information exchanged between you and ORS management and your counsel and our counsel, and considering the information you provided in the hearing, I have reached a final decision. This letter serves as notice that you are being dismissed from your position as a Collection/Compliance Supervisor in the Office of Recovery Services (ORS) in the Department of Human Services (DHS). This decision is made in accordance with DHRM Rule R477-11-2. You are dismissed effective at the close of business on June 18, 2004.

The reasons for your dismissal are those set forth in the letter of intent received by you on June 1, 2004 including the fact that you are in violation of 5 U.S.C. § 1502, the federal Hatch Act; a violation of the DHS conflict of

interest rules; and your failure to advance the good of the public interest.

I would like you to know that I carefully considered your position. However, you admit that you are in violation of the Hatch Act. I also obtained an opinion by the Department of Human Resource Management indicating that the Hatch Act is applicable to you and the position you hold and that since at least May 7, 2004 your violation has been willful and knowing.

Notice is hereby given that you may appeal this final decision with the administrator of the Career Service Review Board (CSRB), (801) 538-3047, in accordance with the provisions of Utah Code Unannotated §67-19a-302(1) and §67-19a-401(5)(a) et seq. within 20 working days of your receipt of this decision.

Sincerely,

/s/ Robin Arnold-Williams
Robin Arnold-Williams, DSW
Executive Director

cc: Emma Chacon
Morris Haggerty
Jay Jensen

U.S. Const. Art. VI, sec. 2.

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5 U.S.C. § 1501. Definitions

For the purpose of this chapter –

(1) "State" means a State or territory or possession of the United States;

(2) "State or local agency" means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

(3) "Federal agency" means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System; and

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include –

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

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§ 1502. Influencing elections; taking part in political campaigns; prohibitions; exceptions

(a) A State or local officer or employee may not –

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office.

(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

(c) Subsection (a)(3) of this section does not apply to –

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.

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§ 1503. Nonpartisan candidacies permitted

Section 1502(a)(3) of this title does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of

whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

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§ 1504. Investigations; notice of hearing

When a Federal agency charged with the duty of making a loan or grant of funds of the United States for use in an activity by a State or local officer or employee has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board, which shall –

(1) fix a time and place for a hearing; and

(2) send, by registered or certified mail, to the officer or employee charged with the violation and to the State or local agency employing him a notice setting forth a summary of the alleged violation and giving the time and place of the hearing.

The hearing may not be held earlier than 10 days after the mailing of the notice.

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§ 1505. Hearings; adjudications; notice of determinations

Either the State or local officer or employee or the State or local agency employing him, or both, are entitled to appear with counsel at the hearing under section 1504 of this

title, and be heard. After this hearing, the Merit Systems Protection Board shall –

(1) determine whether a violation of section 1502 of this title has occurred;

(2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and

(3) notify the officer or employee and the agency of the determination by registered or certified mail.

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§ 1506. Orders; withholding loans or grants; limitations

(a) When the Merit Systems Protection Board finds –

(1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Board that he has violated section 1502 of this title and that the violation warrants removal; or

(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency;

the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation. When the State or local agency to which appointment within 18 months after removal has been

made is one that receives loans or grants from a Federal agency, the Board order shall direct that the withholding be made from that State or local agency.

(b) Notice of the order shall be sent by registered or certified mail to the State or local agency from which the amount is ordered to be withheld. After the order becomes final, the Federal agency to which the order is certified shall withhold the amount in accordance with the terms of the order. Except as provided by section 1508 of this title, a determination or order of the Board becomes final at the end of 30 days after mailing the notice of the determination or order.

(c) The Board may not require an amount to be withheld from a loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of that amount would jeopardize the payment of the principal or interest on the bonds or notes.

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§ 1507. Subpoenas and depositions

(a) The Merit Systems Protection Board may require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter before it as a result of this chapter. Any member of the Board may sign subpoenas, and members of the Board and its examiners when authorized by the Board may administer oaths, examine witnesses, and receive evidence. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at the designated place of hearing. In case of disobedience to a subpoena, the Board may invoke the aid of a court of the United States in requiring the

attendance and testimony of witnesses and the production of documentary evidence. In case of contumacy or refusal to obey a subpoena issued to a person, the United States District Court within whose jurisdiction the inquiry is carried on may issue an order requiring him to appear before the Board, or to produce documentary evidence if so ordered, or to give evidence concerning the matter in question; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The Board may order testimony to be taken by deposition at any stage of a proceeding or investigation before it as a result of this chapter. Depositions may be taken before an individual designated by the Board and having the power to administer oaths. Testimony shall be reduced to writing by the individual taking the deposition, or under his direction, and shall be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence before the Board as provided by this section.

(c) A person may not be excused from attending and testifying or from producing documentary evidence or in obedience to a subpoena on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify, or produce evidence, documentary or otherwise, before the Board in obedience to a subpoena issued by it. A person so testifying is not exempt from prosecution and punishment for perjury committed in so testifying.

§ 1508. Judicial review

A party aggrieved by a determination or order of the Merit Systems Protection Board under section 1504, 1505, or 1506 of this title may, within 30 days after the mailing of notice of the determination or order, institute proceedings for review thereof by filing a petition in the United States District Court for the district in which the State or local officer or employee resides. The institution of the proceedings does not operate as a stay of the determination or order unless –

(1) the court specifically orders a stay; and

(2) the officer or employee is suspended from his office or employment while the proceedings are pending.

A copy of the petition shall immediately be served on the Board, and thereupon the Board shall certify and file in the court a transcript of the record on which the determination or order was made. The court shall review the entire record including questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that the additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce this evidence in the hearing before the Board, the court may direct that the additional evidence be taken before the Board in the manner and on the terms and conditions fixed by the court. The Board may modify its findings of fact or its determination or order in view of the additional evidence and shall file with the court the modified findings, determination, or order; and the modified findings of fact, if supported by substantial evidence, are conclusive. The

court shall affirm the determination or order, or the modified determination or order, if the court determines that it is in accordance with law. If the court determines that the determination or order, or the modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Board with directions either to make a determination or order determined by the court to be lawful or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court are final, subject to review by the appropriate United States Court of Appeals as in other cases, and the judgment and decree of the court of appeals are final, subject to review by the Supreme Court of the United States on certiorari or certification as provided by section 1254 of title 28. If a provision of this section is held to be invalid as applied to a party by a determination or order of the Board, the determination or order becomes final and effective as to that party as if the provision had not been enacted.

5 C.F.R. § 1201.121 Scope of jurisdiction; application of subparts B, F, and H

(a) Scope. The Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act), requests by the Special Counsel for stays of certain personnel actions, proposed agency actions against administrative law judges, and removals of career appointees from the Senior Executive Service for performance reasons.

(b) Application of subparts B, F, and H.

(1) Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part applicable to appellate case processing also apply to original jurisdiction cases processed under this subpart.

(2) Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints and stay requests, and agency actions against administrative law judges, decided under this subpart.

(3) Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with Special Counsel corrective and disciplinary action complaints, and agency actions against administrative law judges, decided under this subpart. Subpart H of this part also applies to requests for consequential damages in connection with Special Counsel corrective action complaints decided under this subpart.

(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the

employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by part 1208 of this title.

5 C.F.R. § 1201.56 Burden and degree of proof; affirmative defenses.

(a) Burden and degree of proof –

(1) Agency: Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (b) of this section, the agency action must be sustained if:

(i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) Appellant. The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

(i) Issues of jurisdiction;

(ii) The timeliness of the appeal; and

(iii) Affirmative defenses.

In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

(b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision;

(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) Definitions. The following definitions apply to this part:

(1) Substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(2) Preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(3) Harmful error. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

Utah Code Ann. § 67-19-18 (2004)

§ 67-19-18. Dismissals and demotions – Grounds – Disciplinary action – Procedure – Reductions in force

(1) Career service employees may be dismissed or demoted:

(a) to advance the good of the public service; or

(b) for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

(2) Employees may not be dismissed because of race, sex, age, disability, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.

(3) The director shall establish rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(4) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (5).

(5) (a) A career service employee may not be demoted or dismissed unless the department head or designated representative has complied with this subsection.

(b) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion.

(c) The employee has no less than five working days to reply and have the reply considered by the department head.

(d) The employee has an opportunity to be heard by the department head or designated representative.

(e) Following the hearing, the employee may be dismissed or demoted if the department head finds adequate cause or reason.

(6) (a) Reductions in force required by inadequate funds, change of workload, or lack of work are governed by retention rosters established by the director.

(b) Under those circumstances:

(i) The agency head shall designate the category of work to be eliminated, subject to review by the director.

(ii) Temporary and probationary employees shall be separated before any career service employee.

(iii) (A) Career service employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first.

(B) Retention points for each career service employee shall be computed according to rules established by the director, allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service

fulfilled subsequent to original state appointment.

(iv) A career service employee who is separated in a reduction in force shall be:

(A) placed on the reappointment roster provided for in Subsection 67-19-17(2); and

(B) reappointed without examination to any vacancy for which the employee is qualified which occurs within one year of the date of the separation.

(c) (i) An employee separated due to a reduction in force may appeal to the department head for an administrative review.

(ii) The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation.

(iii) The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act.

Utah Code Ann. § 67-19-19 (2004)

67-19-19 Political activity of employees – Rules and regulations – Highway patrol – Hatch Act.

Except as otherwise provided by law or by rules promulgated under this section for federally aided programs, the following provisions apply with regard to political activity of career service employees in all grades and positions.

(1) State career service employees may voluntarily participate in political activity subject to the following provisions:

(a) if any state career service employee is elected to any partisan or full-time nonpartisan political office, that employee shall be granted a leave of absence without pay for times when monetary compensation is received for service in political office;

(b) no officer or employee in career service may engage in any political activity during the hours of employment, nor may any person solicit political contributions from employees of the executive branch during hours of employment for political purposes; and

(c) partisan political activity may not be a basis for employment, promotion, demotion, or dismissal, except that the director shall adopt rules providing for the discipline or punishment of a state officer or employee who violates any provision of this section.

(2) (a) Notwithstanding any other provision of this section, no member of the Utah Highway Patrol may use his official authority or influence for the purpose of interfering with an election or affecting the results of an election.

(b) No person may induce or attempt to induce any member of the Utah Highway Patrol to participate in any activity prohibited by this subsection.

(3) Nothing contained in this section may be construed to:

(a) preclude voluntary contributions by a state employee to the party or candidate of the officer's or employee's choice; or

(b) permit partisan political activity by any state employee who is prevented or restricted from engaging in the political activity by the provisions of the federal Hatch Act.

Utah Admin. Code R 477-9-4 (2004)

R477-9-4. Political Activity.

State career service employees may voluntarily participate in political activity according to the provisions in this rule or other federal laws. The following rules apply to career service employees in all salary ranges and positions.

(1) Any state career service employee elected to any partisan or full-time non-partisan political office shall be granted a leave of absence without pay while being monetarily compensated for service in political office. Employees shall not receive annual leave while serving in a political office.

(2) During work time, no career service employee may engage in any political activity. No person shall solicit political contributions from employees of the executive branch during hours of employment. However, state employees may voluntarily contribute to any party or an candidate.

(3) Decisions regarding employment, promotion, demotion or dismissal or any other human resource actions shall not be used on partisan political activity.

(4) Regardless of other provisions in these rules, no member of the Utah State Highway Patrol may use official authority or influence to interfere with an election or to affect election results. No person may induce or attempt to induce any member of the Utah State Highway Patrol to participate in any prohibited activity.

(5) This rule shall not apply to employees who are restricted or prevented from engaging in political activity

through the provisions of the federal Hatch Act. To determine whether an employee shall adhere to the federal Hatch Act, employees may contact DHRM or the employing agency's human resource office for guidelines.

(6) Violations of law governing political activity shall be reported in writing to the Executive Director, DHRM, who shall investigate the validity of any allegation and assess the extent which any activity was knowingly and willfully conducted in violation of law.

Utah Admin. Code R 477-9-4 (2006)

R477-9-4. Political Activity.

A state career service employee may voluntarily participate in political activity according to the provisions in this rule or other federal laws. The employee shall comply with the provisions of the federal Hatch Act, 5 U.S.C. Sec. 1501 through 1508. The following rules apply to a career service employee in any salary range and position.

(1) Any state career service employee elected to any partisan or full-time nonpartisan political office shall be granted a leave of absence without pay while being monetarily compensated for service in political office. An employee shall not receive annual leave while serving in a political office.

(2) During work time, no career service employee may engage in any political activity. No person shall solicit political contributions from employees of the executive branch during hours of employment. However, a state employee may voluntarily contribute to any party or any candidate.

(3) Decisions regarding employment, promotion, demotion or dismissal or any other human resource actions shall not be based on partisan political activity.

(4) Regardless of other provisions in these rules, no member of the Utah State Highway Patrol may use official authority or influence to interfere with an election or to affect election results. No person may induce or attempt to induce any member of the Utah State Highway Patrol to participate in any prohibited activity.

(5) This rule shall not apply to an employee who is restricted or prevented from engaging in political activity through the provisions of the federal Hatch Act. Agency management shall dismiss any employee whose employment is found to be in violation of the provisions of this law by the Merit Systems Protection Board.

Utah Admin. Code R 477-11-2 (2004)

R477-11-2. Dismissal or Demotion.

An employee may be dismissed or demoted for, cause as explained under R477-10-2 and R47-11-1, and through the process outlined in this rule.

(1) An agency head or appointing officer may dismiss or demote a non-career service status without right of appeal by providing written notification to the employee specifying the reasons for the dismissal or demotion and the effective date.

(2) No employee shall be dismissed or demoted from a career service position unless the agency head or designee has observed the Grievance Procedure Rules and law cited in R137-1-13 and Title 67, Chapter 19a, and the following procedures:

(a) The agency head or designee shall notify the employee in writing of the specific reasons for the proposed dismissal or demotion.

(b) The employee shall have up to five working days to reply. The employee must reply within five working days for the agency representative to consider the reply before discipline is imposed.

(c) The employee shall have up an opportunity to be heard by the agency head or designee. The hearing before the department head or designee shall be strictly limited to the specific reasons raised in the notice of intent to demote or dismiss.

(i) At the hearing the employee may present, either in person, in writing, or with a representative, comments or reasons as to why the proposed disciplinary action

should not be taken. The agency head or designee is not required to receive or allow other witnesses on behalf of the employee.

(ii) The employee may present documents, affidavits or other written materials at the hearing. However, the employee is not entitled to present or discover documents within the possession or control of the department or agency that are private, protected or controlled under Chapter 63-2, the Governmental Access and Records Management Act.

(d) Following the hearing, the employee may be dismissed or demoted if the agency head finds adequate cause or reason.

(e) The employee shall be notified in writing of the agency head's decision. Specific reasons shall be provided if the decision is a demotion or dismissal.

(3) Agency management may suspend an employee with pay pending the administrative appeal to the agency head.